

The Future of Drone Strikes:

A Framework for Analyzing Policy Options

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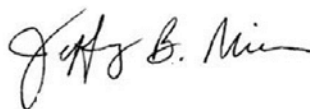
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Summary

Drone strikes against individuals have become a heavily used tool in U.S. counterterrorism operations since the 9/11 terrorist attacks. These targeted killing operations have been effective in many respects, but they have simultaneously been highly controversial, with concerns about aspects such as transparency, legality and collateral damage. This controversy has sparked growing discussion within the U.S. and in the international community about possible policy changes that might address some of the issues surrounding drone strikes.

However, what this discussion has been missing is an approach for analytically evaluating these proposals, particularly an approach for (a) assessing the tactical effects they would have on operations, and (b) incorporating such an assessment with a broad-based evaluation of the implications of public perceptions of drone strike operations. This paper presents a framework for systematically considering policy proposals that aims to fill these gaps. In doing this, it breaks out many of the specific issues that are currently affecting public perceptions of the legitimacy of drone strike operations.

In short, the framework suggests evaluating policy options for drone strikes by considering their expected effects on tactical, operational and strategic military effectiveness, as well as perceived legitimacy, and using these determinations to anticipate the net effect of the options on keeping the U.S. and its citizens largely safe from terrorist attacks. It goes on to provide means through which to analyze

expected effects on tactical military effectiveness and legitimacy, and how these would contribute to net effectiveness.¹

Considerations for evaluating the tactical military effectiveness of a policy option to alter the drone program should include the effects of that option on the tactical steps that constitute a drone strike, such as getting approval for the target and the strike, executing the strike and subsequently reviewing the strike. Impacts on all levels of military effectiveness include potential changes in adversaries' actions that might result from a policy option—for example, a terrorist may be able to avoid being targeted if he or she gains a good understanding of targeting “go/no-go” criteria as a result of increased transparency.

The impact of a policy option on the public perception of the legitimacy of drone strike operations is composed of a number of factors, including the effects of that option on various legal considerations as well as transparency, accountability and ethical concerns, and issues around maintaining secrecy (if secrecy is used).

Finally, the net effectiveness of a policy option is considered by anticipating the broader implications of any expected changes in both tactical military effectiveness and the perception of legitimacy, and the interplay of these factors (operational and strategic military effectiveness should also be considered if they are analyzed).

The framework and the considerations presented in this paper for tactical military effectiveness, legitimacy and net effectiveness are all qualitative; it is left to decision-makers to determine the relative importance of any risks and benefits brought out by these considerations.

1. Operational military effectiveness depends heavily on the types of operations the drone strikes are a part of, and strategic military effectiveness is very broad—thus these two components are beyond the scope of this report. Instead, it is suggested that policymakers, analysts and operators address these topics by narrowing their focus to the types of operations and strategic military effects that are of the greatest importance in the context with which they are concerned.

The considerations described above are discussed throughout the paper in the context of five example policy options that the author has selected from the numerous options proposed, based on their assessed viability and potential to address some of the top controversies surrounding drone strikes. These options are:

- A “preference that the United States military [as opposed to other government agencies] have the lead for the use of force around the world” [1]—termed the “military preference” policy in this report—which was policy guidance issued by President Obama in May 2013, though the implementation of this guidance has been at least partially blocked by Congress [2, 3]
- Two different options for a “drone court” that oversees drone strikes: one modeled after the court established by the Foreign Intelligence Surveillance Act (FISA), and one that would review drone strikes after the fact, as has been established in Israel
- Two options for the public release of additional information: publicly releasing specifics about targeting processes and standards, and publicly releasing information about successfully targeted individuals

Because much information surrounding drone strike practices has not been publicly released and, moreover, important details of these policy options have either not been determined or not been released, the recommendations for these policy options for the most part merely suggest areas of analytic focus for military and civilian personnel who are currently involved in drone strike operations. These recommendations are summarized as follows:

- In order to evaluate the military preference policy, this report finds that focus should be concentrated on anticipating the effects it would have on tactical military effectiveness, and oversight and accountability issues. The military preference policy can be expected to bring more transparency to drone strike operations, and better align these operations with the spirit of certain aspects of international law. If this policy were to include the slightly more restrictive preference that drone

strikes be done under Title 10 of the U.S. Code, it could potentially further enhance the transparency of drone strike practices but might bring about more operational limitations.

- A “FISA-like” drone court that grants approvals for strikes before they are carried out could have significant issues related to legality, and determining its implications for tactical military effectiveness should also be a primary consideration. It is anticipated to bolster U.S. legitimacy in the fewest areas of these five options.
- An “Israeli-style” drone court that reviews strikes after the fact could be implemented in a number of different ways that could bolster the legitimacy of U.S. drone strike operations substantially, but indirect operational impacts also need to be carefully considered and weighed against these potential advantages.
- Finally, releasing further details about U.S. targeting processes and standards and releasing details about targeted individuals could both significantly increase transparency but could also lead to considerable risk to U.S. military effectiveness. Determining exactly what information to release would need to be evaluated carefully in light of these considerations.

The framework presented here could be used to evaluate other potential changes in drone strike policy and practices, and could serve as a basis for a methodology to evaluate proposed changes to targeting operations more broadly.

Introduction

Since the terrorist attacks on September 11, 2001, there has been a steady stream of terrorist plots against U.S. targets and citizens.² The public will likely never know how many attacks have been thwarted by law enforcement, the military and the intelligence agencies, but the would-be “Christmas Day” and “Times Square” bombers³ and the Boston Marathon bombings⁴ make clear the gravity of the threat of terrorism. The U.S. government has been using a wide variety of means in its fight to prevent terrorist attacks. One of those means has been the use of armed drones.

Unmanned Aerial Vehicles (UAVs), known colloquially as drones, have been used to carry out targeted killings since at least 2002, when the U.S. launched an attack in Afghanistan against suspected al Qaeda members [5]. Since then, targeted killings via drone strikes have become an integral piece of the U.S. campaigns Operation Enduring Freedom (OEF) in Afghanistan, as well as against al Qaeda and its associated terrorist groups, reportedly in Pakistan, Yemen and Somalia.

-
2. One report documented 60 terrorist plots against the U.S. from September 11, 2001 through 2013 [4].
 3. The “Christmas Day” bomber, Umar Farouk Abdulmutallab, attempted to detonate a bomb hidden in his underwear during a flight to the U.S. in 2009. The “Times Square” bomber, Faisal Shahzad, attempted to detonate a car bomb in New York City's Times Square in 2010. Both bombs failed to detonate, and the bombers were subsequently sentenced by U.S. courts to life in prison. See, e.g., [4].
 4. Two brothers, Dzhokhar and Tamerlan Tsarnaev, set off bombs that exploded near the finish line of the 2013 Boston Marathon. Tamerlan Tsarnaev was killed in a subsequent confrontation with police, and Dzhokhar was captured and is currently awaiting trial.

The U.S. government has claimed that these strikes are effective. Indeed, in a 2013 speech, President Obama stated: “Dozens of highly skilled al Qaeda commanders, trainers, bomb makers and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, U.S. transit systems, European cities and our troops in Afghanistan. Simply put, these strikes have saved lives” [6].

Drones have proven to be almost an ideal tool for the U.S. in many respects. They can execute kinetic attacks while limiting collateral damage due to their accuracy and ability to surveil targets for hours to determine the presence of other people in the area before striking.⁵ They do not risk the life of a pilot and may be less expensive to operate than manned aircraft. Furthermore, they can enable targeted killing operations in places where the U.S. does not have a presence on the ground.

Moreover, with the problems surrounding Guantanamo Bay, no other readily apparent long-term detention options available for dealing with captured terrorists, and the planned withdrawal of U.S. forces from large-scale combat operations, some argue that drone strikes are becoming one of few remaining tools currently left to use in the U.S. counterterrorism (CT) mission (see, for instance, [8]).

Yet the practice of using drones in targeted killing operations has become highly controversial, both within the U.S. and in the international community, for numerous reasons:

- The U.S. has only vaguely publicly explained its targeting processes and standards, and there is growing pressure for increased transparency and accountability. The United Nations (UN) High Commissioner for Human Rights went so far as to

5. Despite these advantages, however, U.S. claims that drones are “surgical” in their ability to avoid civilian casualties seem not to be supported by operational data: one report makes reference to an analysis of strikes in Afghanistan 2010–2011 showing that drone strikes were ten times more likely to cause civilian casualties than were strikes by manned aircraft [7].

note that, “[t]he current lack of transparency surrounding [the use of drone strikes] creates an accountability vacuum” [9].

- There is controversy in the international community as to whether the practice is in accordance with international law, as is detailed below.
- There is controversy within the U.S. around the authorization of the practice under domestic law, including controversy over the 2001 Authorization for the Use of Military Force (AUMF) and the role of the War Powers Resolution (see, for instance, [10]).⁶
- There have been highly publicized incidents in which innocent people have been mistakenly killed (e.g., [11]).
- The U.S. targeted and killed an American citizen.⁷
- In addition to targeting identified individuals, the U.S. engages in “signature strikes” in which, reportedly, “a strike is authorized based on patterns of behavior in an area but where the identity of those who could be killed is not known” [12].
- Other countries and their militaries are increasingly investing in drones; there is growing concern that the U.S. is not setting a standard for the use of drone strikes that mandates sufficient restraint and transparency.

Because of these controversies, there have been numerous proposals for changes to U.S. drone strike policy from both within and outside of the government. Notably, in May 2013, President Obama issued guidance to implement certain changes [1], although that implementation has been at least partially blocked by Congress [2, 3]. This paper proposes a general framework for evaluating proposed policy options for drone strike operations, with a focus on effects on tactical military effectiveness and the public perception of legitimacy, and how these two factors can influence the net effectiveness of the

6. These important debates are outside the scope of this report.

7. The significant issues and controversies around targeting American citizens are also outside the scope of this report.

operations within the larger CT context. In its analytic approach to evaluating tactical effects and its incorporation of this with the implications of public perceptions, this framework addresses a gap in the current dialogue over drone strikes.

The next section of this paper briefly outlines the framework, and the following section provides an overview of President Obama's guidance and several other policy options. After that, methods for evaluating the effects of proposed changes to drone strike policy on aspects of the framework are presented in three sections: military effectiveness, legitimacy issues, and how these topics contribute to the net effectiveness of a policy option on the broad goal of U.S. security and counterterrorism. The policy options described initially are revisited in these sections, where they are considered in the context of military effectiveness and legitimacy. The last section provides a summary and concluding remarks. Finally, appendices are provided on Title 10 and Title 50 of the U.S. Code, and on covert action. These topics are relevant to the discussion in this paper but are often misunderstood in the current dialogue, and the appendices aim to provide some clarity. Before moving on, however, this section closes with a few words on applying the framework in more general settings.

Applying the framework to targeting in general

In some sense, there is nothing special about the role that drones, as a weapons platform, play in this discussion; the framework below could be applied equally well in the broader context of remote targeting and even targeting in general. However, a broader application of this analysis to targeting in general should be performed with caution.

One reason to exercise caution is that, while the report considers drone strikes within the context of the CT campaign (and, to a lesser extent, that of the “hot” battlefield of Afghanistan), targeting operations could potentially take place within vastly different settings and as components of completely different missions. Any such different type of situation should be considered individually and the framework adjusted appropriately.

Outside of the CT context, for example, the legal considerations around targeting operations may be different. The tactical-level processes may also differ—for instance, the approval of a strike may not need to go up to the same level, and the after-the-fact review of the operation may not be conducted in the same way.

Moreover, outside of the CT context, the current public demand for greater legitimacy in targeting operations is minimal—note that many of the controversies listed above apply primarily to the CT context. No other types of targeting operations share the notoriety of drone strikes within the CT campaign, and it's not even clear that other types of targeting operations are conducted by the U.S. government with any frequency, and hence the American public and the international community may afford such actions the benefit of the doubt, with respect to legitimacy. In contrast, drone strike operations continue to be reported, even as the American public's sense of urgency for CT operations seems to fade with each passing year since the 9/11 terrorist attacks. It follows that the decision-making calculus surrounding the framework presented here—weighing the potential benefits of a policy option against the risks—would be different for targeting operations within and outside of the CT context.

Using different methods for targeting, even within the CT context, also involves relevant differences that could significantly change this decision-making calculus. Indeed, other methods of lethal targeting—by manned aircraft, teams of Special Operations Forces (SOF) or ship-launched Tomahawk Land Attack Missiles (TLAMs), for example—are not subject to many of the controversies or pressure for greater legitimacy that apply to drones. This is in part a question of perceptions: drones elicit a visceral negative reaction from many people, with even the word “drone” misleadingly suggesting the aircraft operate autonomously (one reason why the term is despised by many in the military). The more negative perceptions of drones as compared to other means of targeting is also in part a question of practice. In particular, the U.S. is using drone strikes in circumstances and with a frequency that other platforms would not permit, as a result of factors such as those mentioned above: that drones entail little risk to U.S. forces, may be less expensive than manned platforms, and do not require a ground presence. For all these reasons, the public demand

for increased legitimacy in the case of other platforms is limited, and this would mean that only a potentially modest public-perception benefit would be gained by implementing a policy option that improved, for instance, the transparency and oversight of operations. At the same time, tactical risks of any policy option would be magnified for targeting operations that are not done remotely, such as by a manned aircraft strike or a SOF team, for in those cases mission failure could entail the loss of life of a military service member, or a risky rescue operation.

Hence the framework and analysis presented here may be able to serve as a basis for evaluating policy options for other types of targeting operations, but care should be taken to adapt them as needed.

Outline of framework

The military aspects of the U.S.'s CT campaign can be analyzed along the following lines:

- Four components that are progressively broader in scope:
 - **Tactical military effectiveness (TME):** the level of success of and considerations related to individual components of an operation
 - **Operational military effectiveness (OME):** the level of success of and considerations related to a larger-scale mission or operation, which may entail the actions of multiple units and platforms acting in concert
 - **Strategic military effectiveness (SME):** how well military operations contribute to the success of a military campaign, and how well those operations and that campaign further U.S. interests domestically and on the world stage
 - **Legitimacy:** how U.S. operations, and the military campaign more broadly, are perceived by the American population and the international community
- How these components influence one another and contribute to the **net effectiveness** of U.S. military actions on the terrorism threat against the U.S. and its citizens

The effects of any changes in drone strike policy can therefore be anticipated by considering the impacts on these points. For example, a policy change could influence the TME of drone strikes by affecting the target or strike approval process. Depending on the types of operations in question, a drone strike policy change could influence OME if it affects the quantity and frequency with which drone strikes are carried out, or the deconfliction or coordination between drones and other units and platforms. A drone strike policy change could impact

SME by contributing, for instance, to the elimination of a significant terrorist cell, or to intelligence-sharing or travel and cargo security agreements being put in place between the U.S. and other countries. Finally, a policy change could impact the perception of the legitimacy of U.S. actions by affecting factors like transparency and accountability.

This report focuses primarily on TME and legitimacy. A thorough analysis of the effects of drone strike policy changes on OME and SME is beyond the scope of this report, as OME depends heavily on the details and types of larger-scale operations in which drone strikes are employed, and SME is very broad. These two components would be best addressed by policymakers, analysts and operators by limiting the focus to those operations and strategic military effects that are of the greatest interest or importance in a given context.

Considerations for evaluating the impacts of a drone strike policy change on TME and perceived legitimacy are presented in the sections below. These considerations are illustrated in each section through discussions of several specific policy options, which will serve as a theme throughout this report.

Policy options

Numerous policy options for the use of drone strikes in the CT campaign have been proposed during the last several years. The “military preference” policy, which was issued by President Obama in 2013 (though not yet fully implemented), is one of the policies that is used as an example in this paper. This paper also uses as examples a few of the policy proposals put forth that the author assesses as the most viable and most likely to significantly address some of the problematic aspects of strike practices. Those proposals are: to stand up an oversight body or “drone court” for drone strike operations; and to release more detailed information regarding targeting processes and standards, and/or targeted individuals. This section provides an introduction to these potential policy changes, as well as a preliminary discussion of some of their pros and cons.

Military preference

Drone strikes are currently Department of Defense (DOD)– and other government agency (OGA)–conducted (see, for instance, [5]). However, OGA strikes have become controversial and have potentially negative legal implications, which are discussed below. In May 2013, President Obama issued classified guidance to implement what was described to the media as a “preference that the United States military have the lead for the use of force around the world,” regardless of whether operations are in or outside of war zones [1]; this guidance is referred to here as the “military preference” policy. However, in early 2014 Congress at least partially blocked this policy change through a classified annex to the federal budget [2, 3], so movement in this direction is reportedly happening only very slowly [13].

The military preference policy, as described, would not prohibit OGAs from carrying out drone strikes, but should result in a reduction in the number of strikes they carry out (at least, as “lead” organizations). In practice, this should mean that there will be some missions that in the past would have been completed by an OGA using drone strikes, but instead will: be completed using drone strikes but with DOD as the lead agency, be completed using means other than a drone strike (such as by a small SOF team), or not be completed.

This policy guidance has been interpreted less literally by some to be a preference for drone strike operations to be done under Title 10 of the U.S. Code, which would be subtly distinct from the policy just described, and will also be considered in this analysis. In order to explain the distinction, further discussion is required.

Some confusion surrounds the legal regime that governs drone strike (and other related) operations, evidenced by the common conflation of the military with Title 10 of the U.S. Code and of intelligence agencies with Title 50 of the U.S. Code. The subtlety that is often missed here centers on “covert actions,” which, generally speaking, are actions taken by a government that, at the time the action is carried out, are not intended to be acknowledged by the government.

Title 10 governs the authorities and mechanisms of the armed forces, while Title 50 covers the authorities of the intelligence agencies, intelligence collection and other such secretive activities. There are important details to note with regard to the interplay between Title 10 and Title 50. Relevant to the discussion here is the fact that covert actions are covered in Title 50 (which gives a more nuanced definition than that given above, see Appendix B) and may only be executed if directed by a presidential finding, but their execution is not restricted to any particular agency. As a result, the military may carry out covert actions—including covert drone strikes—under Title 50. See Appendix A for a more detailed discussion. However, military doctrine provides a definition of covert action that is in some ways broader than the definition given by Title 50. In particular, any military action that is classified as a “traditional military activity” (TMA) is

not covert under U.S. law and therefore falls under Title 10, even though it may be doctrinally covert.

A further complication is that the military may act in support of a Title 50 OGA operation. (This was the case for the raid that killed Osama bin Laden, which was conducted covertly by military forces, although the raid was technically a Central Intelligence Agency (CIA) operation [14].) Since such an operation is not technically a DOD operation, this is a separate case from that of the military carrying out a Title 50 operation as described above. This practice serves to further blur the association of government departments and agencies with sections of the U.S. Code.

As mentioned above, some have interpreted President Obama's guidance to express a preference that drone strike operations be conducted under Title 10 as opposed to Title 50, which would mean a preference for strikes to be conducted by the military and not to be done covertly (in the Title 50 sense), although it would not limit clandestine operations.⁸ While this interpretation may not be supported by the terse explanation issued by the White House [1], the guidance itself is classified and therefore unavailable for clarification and public debate. Nonetheless, the preference for drone strikes to be conducted “under Title 10” is a logical one and worth exploring, regardless of whether or not it is a part of President Obama's guidance.

Would there be a practical difference between the military preference and this “Title 10 preference”? This depends mainly on whether, in practice, the military engages in covert actions, as defined in Title 50 (as the lead, as opposed to supporting, agency). Legally it may, as was mentioned above, and the analysis below considers this case.

8. A clandestine operation is defined doctrinally as “an operation sponsored or conducted...in such a way as to assure secrecy or concealment” [15, 16]. Military doctrine goes on to clarify: “A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor” [15, 16]. Appendix B discusses issues related to conducting drone strikes in a clandestine or covert manner.

Thus throughout the following, a preference for drone strike operations to be conducted under Title 10 is considered as a potential option for the military preference policy. It is discussed specifically in the cases when it has different or additional implications than does the military preference in the absence of the additional Title 10 preference.

If the military does not carry out covert actions, this would simplify some of the discussion below. Even so, note that the additional Title 10 preference would make for a more transparent policy. As is discussed in the sections below, there are advantages to transparency, but there might also be military and strategic costs.

Speaking of transparency, even this relatively brief discussion already highlights some of the issues around President Obama's guidance being classified. The public release of what specifically it entails, assuming it is or will be implemented, would significantly increase the transparency of U.S. drone strike operations. A policy option discussed below entails the release of additional information about targeting processes and standards, and could include the release of the guidance, or at least more information describing it. The pros and cons of that general policy option will be considered throughout this paper, alongside those of the military preference policy.

A “drone court”

A push for increased accountability and oversight has resulted in calls for a “drone court” to oversee drone strikes. Although drones have caught the public's attention, it may be more logical to expand this notion to that of a court that oversees remote targeting operations, rather than the court's purview being dependent on the weapons platform being a drone. Moreover, such a mechanism for oversight could potentially exist outside of the Judicial Branch, so even though the word “court” is used throughout the following, this option should be understood to be an oversight body, rather than a court necessarily. Thus the term “drone court” will be used in this report as a shorthand reference to a body that has oversight of remote targeting

operations in which people are killed, including those carried out by drones.⁹

A drone court could take a couple of different forms. One form that is widely discussed is the notion of a “FISA-like drone court,” referring to the court established by the Foreign Intelligence Surveillance Act (FISA). The federal judges presiding over the FISA court approve warrants permitting U.S. agencies (in particular, the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI)) to collect evidence—typically electronic communications—pertaining to foreign intelligence and terrorism. The analog in the drone world would be a court in which judges authorize drone strikes or drone strike targets based on whether they are legally sound and/or in line with U.S. policy, except in cases for which time does not permit, wherein a post-strike review would be conducted. As with the FISA court, the proceedings would necessarily be classified and held out of the public view. The court could be limited to overseeing only operations outside of a “hot” battlefield, or have jurisdiction over all operations.

This option has received high-profile attention. Members of the Senate Select Committee on Intelligence including Chairman Feinstein and Senator King, as well as Senate Judiciary Committee Chairman Leahy and Ranking Member Grassley have expressed interest in it [17, 18, 19]. Former Secretary of Defense and CIA Director Gates expressed support for this option [20], and President Obama has stated his intention to review its merits [6]. However, a FISA-like court raises a number of significant legal and practical questions, such as whether it would be constitutional or an unprecedented intrusion into battlefield decision making and the president's prerogatives as Commander-in-Chief.

Another alternative would be to establish an “Israeli-style drone court” to review drone strikes after they have occurred. Such a system

9. A drone court could alternatively have oversight over targeting operations in general. This may include operations that are in support of more widely varied missions than if the purview of the court was strictly over remote targeting operations.

has been in place in Israel for several years, in which, as stipulated by the Israeli Supreme Court [21],¹⁰ after a targeted killing strike takes place, an independent body carries out “a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him.” These proceedings are not visible to the public, but add some level of oversight and accountability to the process.¹¹ Currently, U.S. government organizations that carry out drone strikes conduct internal investigations according to their own criteria (or sometimes at the direction of the relevant Congressional Committees).

There are many different potential ways to implement an Israeli-style court. It could evaluate strikes based on their adherence to legal or policy standards. It could release its findings to the public or not. It could investigate all targeted killings, or only those alleged to have been improper or that resulted in unintended civilian casualties. As with the FISA-like court, its jurisdiction could be restricted to operations conducted outside of hot battlefields, or not. Under this system, the government could have the opportunity (or be compelled) to release—to Congress or the public—its findings that the target was guilty of wrongdoing. Finally, this system could also serve as an instrument to award monetary reparations in response to civilian casualties and other collateral damage. As with a FISA-like drone court, the Israeli-style model also raises significant legal and practical questions.

The most obvious way to run a FISA-like court or an Israeli-style court would be to have it populated by federal judges. This would keep it within the Judicial Branch, although it would raise some questions about legality and whether the judges would necessarily have the appropriate national security expertise. Alternatively, either type of entity could be run as an independent oversight board within the Executive Branch, which President Obama referred to in a May 2013 speech [6], without providing further details. Another option would

10. This Israeli Supreme Court decision was a landmark one from 2006 in which the Court held that it was legal for the military to execute targeted killings against members of designated terrorist organizations.

11. See [22] for a description of some of the general mechanisms for oversight and investigation used in Israel.

be to implement the drone court as a “national security court”—a hybrid between a federal court and a military commission—existing outside of the federal court system, that is modeled after such a proposal for dealing with detainees [23]. It would be overseen by civilian appointees with expertise in national security issues (see [24]). Both of these options might have significant potential, but would present a significant number of legal and practical issues that are outside the scope of this report.

Releasing further details about targeting

The Obama Administration has put forth basic information about its drone strike targeting practices in various speeches and other communiqués, but the demand for greater transparency continues to grow. The Department of Justice (DOJ) was recently compelled by a Freedom of Information Act (FOIA) lawsuit to release portions of a classified memorandum that put forth its legal rationale for its intention to target U.S. citizen Anwar al-Awlaki [25],¹² while members of the public and even of the Senate Select Committee on Intelligence have pushed for the release of additional DOJ legal memos on drone strike practices [26].

More widely, there have been calls from the UN, Congress, advocates and pundits for the release of further details on U.S. drone strike activities and practices. In the 2014 Intelligence Authorization Act, Congress proposed a provision that would have required the president to report the total number of combatants and noncombatant civilians killed or injured by drone strikes in the past year [27], although it later stripped the provision from the bill [28]. With respect to U.S. targeting processes and standards, Senators Wyden, Udall and Heinrich of the Senate Select Committee on Intelligence noted in a public letter to Attorney General Holder, “The United States' playbook for combating terrorism will sometimes include sections that are secret, but the rulebook that the United States follows should always be available to the American public” [26].

12. Anwar al-Awlaki was an American citizen and a member of al Qaeda in the Arabian Peninsula who was actively involved in terrorist activities [18]. He was targeted and killed by a drone strike in Yemen in 2011.

While the primary focus of these members of Congress may be on the release of information to the American public, greater transparency to the local population in areas of drone strikes may also be desirable. For example, “in a place like Yemen,” one article notes, “although the American drone program is universally hated, many Yemenis will admit they would support targeted assassinations if there is clear intelligence that an individual is a senior operative within AQAP [al Qaeda in the Arabian Peninsula] and plotting a specific and imminent act of terror against Americans” [29].

As one legal scholar asserted, “The government needs a way to credibly convey to the public that its decisions about who is being targeted...are sound” [20]. While certain specifics of U.S. targeting practice and policy should remain protected in order to preserve the effectiveness of the intelligence collection methods and the strikes themselves, the release of some materials might be able to be done in a way that does not prohibitively harm U.S. national security interests. Two separate (and independent) options are considered here: the first consists of releasing more information about the targeting process itself and targeting standards, and the second consists of releasing post-strike details about specific targets. Such information should be released only after any potential harm to the future effectiveness of U.S. practices has been fully weighed.

Specific points of clarification of targeting processes and standards would be along the lines of:

- How many people and from what agencies take part in the target approval process [30]
- What the intelligence review processes are like, in general [30]
- Further explanation of the requirement that a target represent an “imminent” threat [26]
- Provide more detail on what constitutes the “infeasibility” of capture for a target [26]
- What the means are for deciding, for targeting purposes, when members of al Qaeda and its associated forces are performing

continuous combat functions, and when civilians are directly participating in hostilities

- The level of evidence the president needs to determine that a given American may be targeted by military action [26]
- The level of evidence that is needed in order to target unknown individuals in a “signature” strike
- Provide further guidance on what types of military activities are considered TMAs, i.e., are conducted under Title 10, rather than Title 50 (see Appendix A for further discussion)
- What the Congressional review entails [30], including distinctions between the Intelligence and Armed Services Committees' processes
- What President Obama's May 2013 guidance entails, and, to the extent that it is being implemented, what changes it has introduced into U.S. CT practices

The other option is to release some of the target's terrorist affiliations, activities, and plans after a strike is completed, in cases when this can be done without revealing sources and methods in a way that would significantly hinder future operations and intelligence collection. Information released could include:

- Details of the target's ties to al Qaeda or an associated force [30]
- Explanation of the military necessity of the strike and why the threat posed was imminent [30]
- Explanation of why capture was not feasible [30]

Currently, this type of information is only being released in extremely rare cases. For instance, some of these details were addressed in the case of al-Awlaki [16]. Note that an Israeli-style drone court would be one potential way to implement this option.

Summary of policy options

The five policy options described above are revisited in each of the remaining sections of this report. The options are summarized as follows:

- **The military preference:** A preference that drone strikes be carried out by the military. This may or may not include the additional preference that drone strikes be carried out under Title 10, i.e., that drone strikes not be conducted covertly (as defined by Title 50).
- **A FISA-like drone court:** Establishing a process in which drone strikes are authorized by an oversight body (with exceptions for cases in which time is too short).
- **An Israeli-drone court:** Establishing a process that reviews drone strikes after the fact.
- **Releasing further details about targeting processes and standards.**
- **Releasing further details about targeted individuals.**

Military effectiveness

The remainder of this report will describe considerations for anticipating the effects of policy options for drone strikes on military effectiveness (with a focus on TME), perceived legitimacy, and how those factors contribute toward the net effectiveness of combatting terrorism. The policy options described above will serve as examples throughout these discussions.

Effects on TME, OME and SME are crucial factors to consider when evaluating any drone strike policy option. Presented below is one way to think through the effects of an option on TME, as well as considerations related to adversary reactions, which are relevant to all three aspects of military effectiveness.

TME

One way to anticipate effects on TME of a policy option pertaining to drone strikes is to break a single generic strike down into the tactical-level steps that it comprises, and consider the effects on each step individually. This section puts forth the following seven tactical steps to consider for drone strikes:

1. **Targeting:** Intelligence products are used to designate a target based on established criteria.
2. **Approval of target:** The appropriate authority approves of the target. This can happen in conjunction with “approval of strike” step.
3. **Plan strike:** The strike is planned, coordinated and deconflicted by the forces that will conduct it, and resources are apportioned for it. The plan requires a drone based within reach of the strike area, either on land or afloat, and the use of airspace between the base and the strike area.

4. **Approval of strike:** The appropriate authority approves of the strike. This can happen months, days or hours before the strike is executed.
5. **Conduct strike:** The strike is carried out in accordance with plan, as well as the standard procedures set by the organization(s) in command and control of the operation.
6. **Immediate review:** A battle damage assessment (BDA) may be conducted, either by surveillance assets like a drone or by individuals on the ground. The strike may be debriefed by operators, and lessons learned may be extracted.
7. **Longer-term review and reaction:** The outcome of the strike may be reported to oversight authorities such as Congress. If there are significant concerns about the strike or its outcomes, an internal or external investigation may be conducted, and could result in disciplinary actions, acknowledgement of collateral damage, or changes to training or operations. Any lessons learned may also be absorbed and reflected in adaptations made to training or operations.

Note that the immediate and longer-term review steps may entail the many actions listed, or none at all.

The specifics of how each step is carried out will depend on the organization(s) carrying out the operation and the details of the operation itself. These steps will also vary depending on whether the strike is planned well ahead of time or arises out of a dynamic situation, such as if an opportunity for a spontaneous strike is observed that would further the objectives of the campaign, but for which the target or strike itself had not previously been approved (such as in the case of a signature strike). In the language of DOD's Joint Publication 3-60: Joint Targeting [31], these are “unanticipated” or “unplanned” targets of opportunity, respectively. In those cases, the target and strike planning and approval processes might be based on general guidelines, with a more robust review after the strike takes place.

DOD doctrine supports the division of the targeting process into the generic steps. In particular, the steps are reflected to some extent in

the six steps of the Joint targeting cycle from Joint Publication 3-60 [31], which are the following:

1. End state and commander's objectives, where forces ensure that the commander's intent, the conditions that characterize the military objectives have been met, and corresponding metrics are all developed and thoroughly understood by forces. (This step is not a part of the process described above.)
2. Target development and prioritization, in which the adversary's systems of interest are analyzed to determine potential targets and those targets are developed, prioritized, nominated and approved.
3. Capabilities assessment, in which forces evaluate their own capabilities in the context of perhaps numerous anticipated target requirements and determine and analyze options for prosecuting those targets.
4. Commander's decision and force assignment, where options from the previous step are further analyzed with respect to the available forces, systems and necessary support; the commander approves the target list; and forces are tasked.
5. Mission planning and force execution, where the operations are planned in detail, adjusted as necessary in reaction to any changing conditions, executed, and an initial BDA is completed.
6. Assessment, in which the commander evaluates the effect of the actions from the five previous steps on achieving the necessary objectives, does further BDA and recommends follow-on actions.

Several of the seven tactical steps have been expounded upon by government officials. For example, in a 2012 speech, John Brennan, the then-chief counterterrorism advisor to President Obama and the current Director of the CIA, noted that the target approval step entails an evaluation of whether the potential target is a “significant threat to U.S. interests” and goes up to the “most senior officials in our government” [32]. This was supported by interviews with several DOD officials, who specified that a group of senior officials from agencies such

as the Departments of State and Justice review the relevant intelligence and approve or reject the DOD targets. The officials also noted that DOD's target approval process entails interagency legal vetting.

Minimizing civilian drone strike casualties has always been a priority of the U.S. [32, 33], and President Obama recently specified that the current policy is that strikes be carried out only if there is “near certainty that no civilians will be killed or injured” [6]. Furthermore, a planned strike is approved only if U.S. forces have a “high degree of confidence” in the identity of the target [32]. Immediate review includes BDA, and if collateral damage occurred then longer-term review and reaction can include analyzing the strike process and making changes based on those findings [32].

Effects of the policy options

The military preference, FISA-like drone court and Israeli-style drone court policies would each have implications on the tactical steps of a drone strike. The implications should be evaluated fully by those currently involved in drone strike operations. Some initial considerations along these lines are the following.

For the military preference policy, note that how each of the seven tactical steps is carried out might differ depending on the agency leading the strike. Take for instance “longer-term review and reaction”: oversight for many DOD drone strikes is with the Congressional Armed Services Committees, while a drone strike carried out by an OGA will have oversight by the Intelligence Committees.¹³ Also, each organization that carries out drone strikes follows its own procedures, so the mechanics for strike planning and execution will vary depending on whether strike planning and execution are conducted by the DOD or an OGA. DOD and OGA operators and other relevant personnel should be able to predict the effects the military preference policy would have on each of these steps.

13. Whether there is a substantive difference between the oversight of the different Congressional Committees is thus an important question, which publicly available information may not answer.

The necessary regional access to carry out drone strikes might also vary depending on the organization conducting the strikes. For example, OGAs apparently have a flexibility to operate in Yemen above that of the military. Indeed, as a result of a number of drone strikes that have mistakenly killed innocent people, Yemen has banned the U.S. military from conducting drone strikes, though OGA strikes reportedly continue to be conducted [13]. This example shows that the military preference policy might hinder the U.S.'s ability to launch strikes in certain places.

Moreover, the drone strike process looks different depending on whether or not a strike is covert, so there would be further ramifications if the military preference policy included a preference that drone strikes be conducted under Title 10 (i.e., not be conducted covertly, in the Title 50 sense). Indeed, a Title 50-covert strike requires a presidential finding for approval, whereas other strikes need not rise to this level of authorization. Oversight of a Title 50-covert strike must include the Intelligence Committees, and any investigations or acknowledgement of collateral damage could, by definition, only be internal to the government in the case of a covert strike. Again, DOD and OGA operators and other relevant personnel should be able to estimate the effects of these factors.

A FISA-like drone court would affect the target approval process, with the court itself adding an additional layer of oversight and time via its deliberations to ensure that the legal basis for the proposed action is sound. While those factors could hinder fast and streamlined execution of strikes, they could potentially serve as an additional check against collateral damage and other unintended consequences. An Israeli-style drone court would add additional accountability and perhaps a mechanism for addressing collateral damage in the longer-term review and reaction processes. The additional accountability could potentially have a chilling effect on operations as well.

Finally, all of the policy options considered in this paper could have an effect on the cooperation of U.S. allies and other nations with U.S. drone strike operations, including, for example, drone basing and airspace usage, as mentioned in the planning step. These types of aspects of drone strike operations are discussed more holistically below.

The enemy's vote

“The enemy gets a vote” in the outcome of any military action, as the saying goes. Consider a single drone strike, which entails the process described above. The actions of the target and his or her network can make the steps of that process easier or harder to accomplish successfully, and this is based in part on their understanding of U.S. methods of intelligence collection, operations and procedures. This topic affects TME, OME and SME.

For the targeting stage, the collection of intelligence to identify the target and his or her terrorist activities and affiliations is crucial, and in order to plan the strike, establishing intelligence on the local area and the target's pattern of life is necessary. All of this depends on U.S. forces' intelligence-gathering capabilities being effective in the target's local area, and the target (and their network) not being able or aware enough to avoid these efforts. Intelligence-sharing agreements with U.S. allies can also provide an essential complement to these capabilities.

The strike must be conducted in accordance with the executing organization's standards and procedures, and the more the target knows about these, the more they would be able to make sure those standards are not met, so that the strike could not take place. For example, President Obama has said in recent years that current U.S. policy is that, “before any strike is taken, there must be near-certainty that no civilians will be killed or injured” [6]. Hence, if a terrorist can ensure that they are typically clearly in the presence of civilians, they may be able to avoid a strike. In that vein, the more terrorists know about the target approval and accountability processes for strikes, and the more robust those processes are, the more the terrorists may be able to deduce ways of making U.S. forces less inclined to act, either because a strike is not approved or for fear of repercussions under the accountability processes. On the other hand, less transparency about targeting practices could provide strategic ambiguity around U.S. actions, which could be exploited to deter potential terrorists.

Effects of the policy options

The obvious danger in the policy options that consist of releasing more information on the U.S. targeting processes and standards or individuals who were strike targets is that terrorists might be better able to thwart intelligence-gathering and strike operations based on a better understanding of these processes. This is a significant risk to the military effectiveness of drone strikes that should be taken into account when analyzing options.

As for the military preference policy, one of the main arguments for the policy is that DOD carries out operations under a relatively well-understood collection of standards and procedures. Former Director of National Intelligence (DNI) Admiral Blair noted that, “within the armed forces we have a set of procedures that are open, known for how you make decisions about when to use deadly force or not, levels of approval, degrees of proof and so on and they are things that can be and should be out” [34]. The extent to which the transparency of knowing that all drone operations must comport to those standards would make terrorists more able to avoid drone strikes is similarly a factor that should be taken into account.

Finally, the additional approval authority of a FISA-like drone court or the additional accountability measure of an Israeli-style drone court might also prevent the U.S. from acting in certain instances, which could potentially be manipulated by terrorists. The extent to which this could happen will depend on the standards of the court(s) as well as the transparency of those standards.

Summary of military effects issues

The discussion above provides a way to think through evaluating the potential effect of a policy change for drone strikes on TME by considering the various processes a single drone strike comprises. The generic drone strike steps highlight specific areas to consider within TME when evaluating policy options like the ones considered here. In order to make a concrete evaluation, input from current operators and the details of how the policy options would be implemented would be needed.

This section also suggests a significant area in which a policy change could indirectly impact military effectiveness at the tactical, operational and strategic levels: that of terrorists' abilities to avoid being targeted. Indeed, the more individuals know about drone strike practices and targeting guidelines, the more they may be able to avoid meeting the criteria for a strike. Since all of the policy options presented involve some degree of greater transparency for drone strike operations, all risk giving terrorists this type of advantage—particularly the options for releasing more information about targeting processes and standards, and targeted individuals.

Legitimacy

U.S. actions abroad are considered legitimate to a given audience to the extent that they are in line with that group's values and perceived norms. For instance, the U.S. will garner legitimacy in the eyes of the West if U.S. actions are consistent with Western values (such as transparency, and advancing personal and economic freedoms) and international law, which perhaps forms the perceived set of norms in the West. To the international community writ large, the common values might be more basic, including principles such as fairness, accountability and ethical standing, and perhaps only portions of international law form the common perceived norms. The values of the American public combine Western values with an American worldview. For example, after years as an active global hegemon, an American worldview might be more interventionist than that of the West as a whole.

This section provides a discussion of the international legal context in which drone strikes are carried out. After that, it provides the details of the “legitimacy” portion of this paper's framework by specifying numerous legitimacy issues, and it discusses how these issues are addressed by the five policy options.

International legal context

The U.S. CT campaign against al Qaeda and its associated forces is carried out within the context of international law. Whether drone strikes are seen to be consistent with international law forms a major

component of their perceived legitimacy throughout the world.¹⁴ This section provides background on the existing international legal framework and how the U.S. government has described its drone strike practices as fitting into that framework. It also discusses some controversies and issues that have emerged around the U.S. CT campaign and drone strikes more specifically, as well as the role that the policy options considered here could play in addressing some of those issues. The reader who is not interested in a detailed discussion of these topics may prefer to skip to the next section, where the issues identified here are briefly reiterated.

The U.S. government has stated unequivocally that the U.S. use of drone strikes is consistent with international law (see for example [6, 32, 35]).¹⁵ In particular, it has asserted that its use of drone strikes in CT operations is a legal use of force because it is in self-defense, in response to the 9/11 terrorist attacks and the continuing terrorist threat from al Qaeda and its associated groups (see, for instance, [32, 35, 36]).¹⁶ Indeed, on September 12, 2001, the United Nations

14. This is true even though international law has significant areas of controversy and ambiguity. For example, the Geneva Conventions—consisting of four Conventions and three Additional Protocols—form the basis for important aspects of international law. Even so, many countries have not ratified one or more of the Additional Protocols, including the U.S., which has not ratified the first and second of the Protocols. However, some articles from the Protocols have been deemed customary law, and thereby apply to all nations.

15. The U.S. government has also stated unequivocally that its drone strike practices are consistent with domestic law [6, 32]. However, this report focuses primarily on international law.

16. The UN Charter permits the use of force against a threat within another nation's borders under three circumstances: for self-defense (including collective self-defense), with the consent of the host nation, or in accordance with a Security Council resolution. In the case of self-defense, the host nation must be unable or unwilling to act against the threat.

Security Council passed a resolution condemning the 9/11 attacks and noting nations' right to self-defense [37, 38].¹⁷

The U.S. contends that it is involved in an armed conflict with al Qaeda and its associated forces [6, 32, 36, 39]—specifically, what some term a 'transnational' Non-International Armed Conflict (NIAC).¹⁸ This assertion is not without controversy, however. For instance, the International Committee of the Red Cross (ICRC) takes issue with the classification of all U.S. actions against al Qaeda and its associated forces in this way; its position is that each “situation of violence” should be considered separately and classified as an International Armed Conflict (IAC), a NIAC, or not an armed conflict on a case-by-case basis, and that situations of violence in the U.S. CT campaign have fallen under each of these categories [43].

International Humanitarian Law (IHL) governs the use of force in armed conflicts. IHL stipulates, for example, that individuals are targetable in an armed conflict if they are members of the armed forces of a party to the conflict or additionally, in the case of a NIAC, if they are members of an organized armed group that is a party to the

17. On the domestic front, on September 14, 2001, the U.S. Congress passed the Authorization for the Use of Military Force (AUMF), which permitted U.S. military action against the individuals, organizations and nations that perpetrated or aided in the 9/11 attacks, without geographic or temporal limitations.

18. International law has differing standards for the use of force within and outside of armed conflicts, and also distinguishes between International Armed Conflicts (IACs) and NIACs. A conflict is an IAC if it is between nations or is a population defending its right of self-determination against “colonial domination and alien occupation and...racist regimes” [40]. Outside of these “national liberation” cases, a conflict is a NIAC if one or more of the main parties to the conflict is an organized non-state group (meaning that the group has “...certain command structure and the capacity to sustain military operations” [41], and the conflict is protracted and is of a level of intensity above that of “internal disturbances and tensions, such as riots” [42] (see also [41])). (The notion of a “transnational” NIAC is a newer one.) A conflict is not an armed conflict if it does not fall into these two categories, i.e., if violent events are sporadic or rise only to the level of intensity of a disturbance, or parties to the conflict are not sufficiently organized.

conflict and have a continuous function to directly participate in hostilities [44, 45]. In addition, civilians may be targeted if they are directly participating in hostilities, subject to meeting specific criteria regarding the nature of their actions [44, 45].¹⁹ Any such targeting or use of force is further subject to the principles of military necessity, distinction and proportionality under IHL.²⁰

The Obama Administration has argued that its targeting practices conform to these principles [32], and has outlined further aspects of U.S. targeting to make the case that it is in line with IHL and to some extent with International Human Rights Law (IHRL), which includes a more stringent set of standards for the use of force that applies even outside of armed conflicts.²¹ In particular, IHRL allows individuals to be targeted with force only if they provide an imminent and substantial threat to life, and arrest is not reasonably possible.

The Obama Administration has provided some clarification as to who qualifies as a targetable member of al Qaeda and its associated groups. In a 2012 speech [46], then-DOD General Council Jeh Johnson stated:

An “associated force,” as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-bellig-

19. The topic of direct participation in hostilities is nuanced and an area of debate which is beyond the scope of this paper.

20. Necessity is the requirement that force only be used lawfully and to the level needed to achieve the military objective. The principle of distinction speaks to distinguishing between legitimate military targets and protected entities (such as civilians who are not taking part in hostilities, or civilian infrastructure): attacks must attempt to limit damage to legitimate targets as is possible, and armed forces should attempt to distinguish and separate themselves and their fixtures from the civilian population. Proportionality requires that collateral damage be limited to a level “proportional” to the military objective sought. In addition, some cite the principle of humanity, which requires the use of weapons that do not inflict unnecessary suffering.

21. These aspects of IHRL can be considered regulation on law enforcement.

erent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners.

Harold Koh, then-legal advisor to the Department of State, provided that U.S. forces' criteria for determining individual membership in al Qaeda or an associated group “includes, but is not limited to... relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces” [36].

Harkening back to IHRL standards, lethal force is used only if the target “poses a continuing, imminent threat to U.S. persons,” and only then when capture is not feasible and there are “no other reasonable alternatives” to address the threat posed [47]. Attorney General Holder spoke to the notion of the feasibility of capturing a terrorist suspect in the case when that suspect is a U.S. citizen, although that criteria could potentially apply to suspects of any nationality [35]:

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel...In that case, our government has the clear authority to defend the United States with lethal force.

When he was the chief counterterrorism advisor in the Obama Administration, John Brennan described aspects of targeting processes and standards [32]. A potential target and suspected al Qaeda member is vetted to determine lawfulness, and in that case presented to “the very most senior officials in our government” for evaluation. Interviews the author conducted with several DOD officials confirmed that the target nomination meetings are lively interagency interactions at an extremely high level. Brennan noted that one criterion considered during the target approval process is whether the individual poses “a significant threat to U.S. interests,” for instance is an operational leader, is making preparations to attack U.S. interests, or “possesses unique operational skills that are being leveraged to plan an attack” [32].

Once the target has been approved, a strike is executed only “if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing” [32], if there is a “near certainty that no civilians will be killed or injured” [6], and if the country the strike would take place in either consents or is unwilling or unable to address the threat (see, for instance, [32, 35]). After the strike, forces utilize “the full range of...intelligence capabilities” to determine if the target was killed as well as collateral damage [32]. If innocent civilians were harmed, Brennan notes that U.S. forces review their actions and strive to make improvements. Moreover, operating forces “regularly” report to Congress and Congressional Committees on strikes carried out [32].

Legality issues

There is significant controversy in the international community over the legality of the U.S.'s CT campaign. Some of the issues of contention might be able to be alleviated by further clarification of the U.S.'s legal position, though one military attorney noted the current context of a lack of consensus around even the basic framework of the law [48]:

...[The] overt disagreement on the answer to the legality question masks that the various participants in the discussion are utilizing wholesale different methodologies and talking past each other in the process. Some speak in terms of how the United Nations Charter governs the overarching question of legality; others claim that the Charter provides only some of the framework; and still others posit that the Charter does not meaningfully apply at all. This divergence leads to correspondingly varied answers as to what extent the law of armed conflict (LOAC) or human rights law applies to the use of force through the United States engaging targets in Pakistan. These answers range from the characterization of the conflict in Pakistan as a war and UAS [Unmanned Aerial System] strikes as “just the killing of the enemy, wherever and however found” to the same strike being labeled extrajudicial killings, targeted assassination, and outright murder.

A UN Special Rapporteur noted that the U.S. use of drone strikes outside areas of active hostilities “gives rise to a number of issues on

which there is either no clear international consensus, or United States policy appears to challenge established norms” [39]. Even former CIA Director Hayden has reportedly said that “virtually nobody in the rest of the world agrees with United States targeting policy” [49]. Moreover the UN Special Rapporteur noted that international consensus is lacking on a number of legal issues of importance to drone strike operations, and urged the U.S. (and other Member States) to “further clarify its position” [39].

One of the primary issues is the ambiguity and subjectivity in the definition of an armed conflict. As mentioned above, some contend that a portion of the areas in which U.S. CT operations such as drone strikes take place should be considered below the “threshold” of armed conflict, and that IHRL targeting standards should be used.

Another issue of controversy is the U.S.'s criteria to satisfy a target posing an imminent threat, which have been criticized for being overly broad. Indeed, a DOJ legal memo [50] argues that, due to the nature of terrorism, “delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.” It concludes that, “the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” [50]. While DOJ makes a crucial point, this usage is at odds with the definition of the word “imminent” and signals a departure from the historical criteria for a nation to act preemptively in self-defense only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation” [51]. (Incidentally, imminence is required for targeting under IHRL.)

As an aside, this example provides a caution for the policy options that entail releasing further information about the drone strike targeting processes and the targets themselves: while such releases may be intended to bolster U.S. legitimacy in the eyes of the public and the international community, they could backfire if U.S. practices are confusing, appear questionable, or do not stand up to scrutiny.

These types of ambiguities and controversies seem to have resulted in confusion in the public over what legal framework the U.S. is using, although the government has specified its use of the armed conflict framework. The government's policy of having especially “high and rigorous standards” for targeting [32] beyond what is required in IHL may add to the confusion, for along with the government's emphasis on requiring an “imminent” threat, a typical expectation of no innocent casualties is also reminiscent of the targeting standards from IHRL, but is not a requirement of IHL. Also adding to the confusion is the growing conflation of concepts from IACs and NIACs (c.f. [52]) and conflation of the legal frameworks governing armed conflicts and terrorism [43].

Indeed, acting in a manner that is consistent with international law while combatting this new type of terrorist threat is not easy. As one report notes:

The rise of transnational non-state terrorist organizations confounds preexisting legal categories. In a conflict so sporadic and protean, the process of determining where and when the law of armed conflict applies, who should be considered a combatant and what count as “hostilities” is inevitably fraught with difficulty...The legal norms governing armed conflicts and the use of force look clear on paper, but the changing nature of modern conflicts and security threats has rendered them almost incoherent in practice. Basic categories such as “battlefield,” “combatant” and “hostilities” no longer have clear or stable meaning. [53]

The way the U.S. is waging the present “transnational NIAC” has novel elements compared to how NIACs were fought in the past. History has yet to show whether these novelties represent a paradigm shift and adaptation of international law or a deviation from the law.

One example of the novel aspects of the current U.S. framework is the level of participation in hostilities such as drone strikes by nonmilitary U.S. personnel such as OGA personnel and military contractors, as well as the reported military support to actions under the purview of OGAs (see, for example, [54]). This raises questions about whether the protections IHL affords to combatants (combatant privilege and Prisoner of War (POW) status if captured) apply to these

individuals (see [55]), although at least in the case of drone strike operations, the questions may be primarily academic: many U.S. personnel involved in drone strikes operate from within the U.S., and in any case al Qaeda has been known to have brutally killed U.S. and coalition forces in Afghanistan without regard for IHL. However, this suggests that the military preference for drone strike operations might be preferable to an absence of such a policy from the standpoint of international law, or the spirit thereof.

On a related note, questions have also been raised about whether military service members involved in covert actions under Title 50 would be entitled to the protections afforded by IHL to combatants [56]. Concerns along these lines would be best addressed by restrictions on DOD conducting covert actions—such as the military preference policy with the additional preference that actions be under Title 10—without stricter limitations on OGAs, if indeed the military carries out covert actions and there are reasons to think that current restrictions and processes are insufficient. (Appendix B notes that a preference for operating under Title 10 does not restrict the military from carrying out unacknowledged TMAs, so this option might not sufficiently address this issue.)

Exploring further the differences between DOD and OGAs that are relevant to IHL, it is the case that DOD is explicitly obligated to comply with IHL, and its tactics, techniques and procedures (TTPs) are in accordance with international law. On the other hand, it is unclear whether or to what extent OGAs are in practice bound by IHL and other international laws in their actions. (Note that this uncertainty is probably by design: some OGA tactics may be more effective if the limits of their actions are not known.) A further difference between DOD and other government agencies is the relatively high level of transparency in DOD's chain of command. For these reasons, the military preference has the potential to provide more confidence in the legality of U.S. drone strike practices.

Another notable aspect of the current U.S. framework is the lack of limitation on the geographic scope of the U.S. campaign against al Qaeda, as reflected in the AUMF. Whether this is appropriate and legal is another point of contention in the international community

(see, for instance, [39]). What is not under debate is the reality that legitimate al Qaeda-related threats have operated in multiple areas around the globe. The U.S. government attempts to assuage international concerns by its policy to respect nations' sovereignty and act in a country against a threat only with that country's consent or if it is unable or unwilling to effectively act against the threat (see [32, 35]).

Another issue is that three of the U.S.'s stated standards of targeting—the standards for targeted individuals' membership in al Qaeda or an associated force, the individuals being an imminent threat to U.S. persons and a near certainty of no civilian casualties—appear to be at odds with the widely reported U.S. practice of “signature” drone strikes, in which unknown individuals are targeted based on their patterns of behavior. Indeed, this practice is highly controversial, both within and outside of the U.S. (see [29] and [57], also the minority views in [58]). Within combat zones, there is no requirement in IHL to know the identity of targeted individuals, so the concern lies in carrying out signature strikes outside of areas of active hostilities, and is one of the controversial consequences of the geographic scope of the U.S. campaign and its classification as an armed conflict by the U.S.²² Some have called for an end to signature strikes (e.g., [59]). Short of that, releasing information on the general parameters for these strikes—either by releasing more details about the targeting process or cases of targeted individuals—together with the legal rationale for these strikes could assuage some of this controversy, although if unconvincing, then such releases would just confirm concerns about signature strikes.

One final issue, noted by a UN Special Rapporteur, is that in an armed conflict, “in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation” [39]. This level of transparency to the public (and accountability, depending on DOD and OGA internal practices for holding inquiries) is not present currently. Insti-

22. Signature strikes are a complex topic of much importance. However, an analysis of the practice—from a legal perspective or otherwise—is outside the scope of this report.

tuting an Israeli-style court to review instances of civilian deaths could provide a good mechanism for carrying out such investigations.

These issues are revisited next, as one component of the larger concept of legitimacy.

Legitimacy issues

A number of controversies about the legitimacy—to Western, international and American audiences—of U.S. drone strike operations have been raised in the public sphere by policy proponents, academicians, defense analysts, lawmakers and pundits. The issues around legality discussed above are among them, as legality contributes significantly to the legitimacy of these operations. Other issues that have been raised fall into the categories of transparency, accountability and ethical standing; secrecy around U.S. actions also plays into this topic. Select issues are discussed in this section, together with how (or if) they could be addressed by the drone strike policy options.

When it comes to addressing public controversies over drone strikes (or any other practice), note that it is the perception of legitimacy to the public more than legitimacy itself that will be effective. In other words, legitimate practices that have no visibility to the public will not mitigate public controversies, while effectively hiding illegitimate practices will keep public controversies from worsening. This latter reality is discussed further in the section below on secrecy. At the same time, note that increased transparency (and publicly outlining positive practices when their details cannot be released) can mitigate the former point.

Legality

The previous section outlined a number of issues for drone strikes related to international law. Those issues are summarized in this section. Concerns and controversies with regard to domestic law exist but are outside the scope of this report.

Controversy over specific aspects of the U.S.'s legal rationale

Legal experts have challenged certain specific aspects of the U.S.'s legal rationale. Issues include:

- Whether an armed conflict legal framework should be used in all areas where the U.S. is conducting drone strikes and other such operations, as the U.S. has put forth
- Whether the U.S.'s concept of an individual posing an “imminent” threat is too broad
- Whether the geographic scope of the current CT campaign should be unlimited, as the U.S. argues

These are significant areas of controversy and are not addressed by any of the policy options considered here.

Questions about IHL protections to nonmilitary and military personnel

Individuals in the military have raised questions about to what extent IHL protections apply to:

- Nonmilitary personnel involved in drone strike operations [55]
- Military personnel carrying out covert actions [56]

Assuming that IHL protections do not completely carry through in these settings, note that the military preference policy could help to address the first issue and the military preference policy with a Title 10 preference could help to address the second. This suggests that the military preference policy may be more consistent with the spirit of some aspects of international law than current U.S. practices.

Lack of transparency in OGA compliance with international law and OGA chains of command

At the present, it is unclear to what extent OGAs comply with international law. Furthermore, there is little transparency into operational OGA chains of command. The military does not have these issues, thus the military preference policy would address these concerns in the context of drone strikes.

The legality of signature strikes and their consistency with stated targeting policies

Signature strikes are highly controversial and appear not to necessarily meet certain stated thresholds for targeting: that the target is a member of al Qaeda or an associated force, that the target be an imminent threat, or a near certainty of no civilian casualties. The release of supporting information about targeting processes/standards or about targeted individuals could help to mitigate this controversy.

The potential obligation for inquiries into and public explanation of civilian casualties

UN Special Rapporteur has asserted that countries have an obligation within armed conflict to run an inquiry and provide detailed public explanation whenever civilians have been killed (or appear to have been killed) [39]. An Israeli-style drone court could provide a mechanism for this.

Transparency

The following three issues on the topic of transparency have been identified.

Significant information about targeting policy and practices are unknown

The section that introduced the two policy options of releasing more information about targeting processes/standards and targeted individuals highlighted a number of important questions about drone strikes that have so far gone unanswered by the government. Providing at least some of this information would greatly increase the transparency of drone strike operations.

In addition, the military preference policy would reduce the role of OGAs in drone strike operations. Since so little information is publicly available about OGA drone strike practices, these policies would also increase transparency.

Oversight by Congressional Committees is largely classified

Most of the oversight (such as the hearings) of the House and Senate Intelligence Committees over drone strike operations is classified, and as a result, not publicly available. In addition, most of the House and Senate Armed Services Committees' oversight related to DOD drone strikes is also classified. While this may be necessary, it would increase transparency if more oversight were conducted at the unclassified level and publicly released.

One or the other of the committee pairs might be able to more effectively declassify and release oversight products; in this case, the military preference policy would have an implication for this issue. If a preference for Title 10 drone strikes were a part of the military preference, fewer covert drone strikes might be carried out, and hence there would be less secrecy around drone strikes overall. Strike information and oversight may still be classified, but it would be less sensitive and perhaps more able to be publicly released.

An Israeli-style drone court could be used as a tool to publicly release more oversight information. A FISA-like court might have a (marginal) indirect effect on this issue, in that the court could take some of the pressure for oversight off of Congress, in which case Congress might regard some of its oversight proceedings as less politically sensitive and therefore would be more inclined to release additional information from its proceedings.

Finally, releasing additional targeting information would be consistent with a push to declassify and release drone strike information, and might allow the Committees to release more information about their work.

Supporting and supported roles within an operation further blur legal distinctions

It was mentioned earlier in this report that DOD may act in support of an operation that an OGA has the “lead” on. In fact this type of relationship is not unusual within some parts of the government (and within the military itself). For example, a CIA specialist could be temporarily assigned to an FBI team to help with certain domestic operations that the CIA would not itself be authorized to carry out, and

military special operations forces could augment a CIA team in a covert operation that is under CIA command and control and under Title 50 authority.

A more extreme example would be when an entire unit from one organization is placed under tactical control, or TACON, of a separate “lead” agency, and acts with more minimal involvement from the lead agency, although the lead agency bears ultimate responsibility for the operation. This appears to have been the case for the Abbottabad raid that killed Osama bin Laden in 2011. In his interview on CNN following the raid, then-CIA Director Panetta stated that he had commanded the operation, but that “the real commander was Admiral McRaven because...he was actually in charge of the military operation that went in and got bin Laden” [14].

These types of situations—perhaps unsurprisingly—can lead to public confusion around issues of authorities, although authorities and chains of command may be clear to the operators carrying out the missions.²³ Public visibility (and perhaps even visibility from within the government) into these types of operations can be lacking, and carrying out this type of support could potentially enable the skirting of certain oversight mechanisms.

The military preference policy might make these types of situations rarer by imposing a preference for the military to be the lead on drone strike operations and therefore not be subordinate to an OGA, although it might also increase the likelihood that OGA forces would operate subordinate to DOD. Personnel currently involved in drone strike operations should be able to analyze the extent to which these types of lead/supporting relationships are present during the operations, and how much the policies would increase or decrease the practice. The release of further details about targeting processes could also clarify this practice.

23. However, it has been contended that Panetta's description of the operation illustrates that “critical confusion exists even among the most senior U.S. leaders about the chain of command and the appropriate classification of such an operation” [55].

Accountability

Two issues are presented in this section on the topic of accountability, both of which have to do with strike casualties.

Information not released after strikes

It has been argued that the lack of publicly released information on casualties from individual drone strikes—both targets and collateral damage—creates an “accountability vacuum.” One report asserts, “we do not believe it is consistent with American values for the United States to carry on a broad, multi-year program of targeted strikes in which the United States has acknowledged only the deaths of four U.S. citizens, despite clear evidence that several thousand others have also been killed” [53].

Releasing information on collateral damage casualties as well as successfully targeted individuals would be a practice that could bolster U.S. accountability, transparency and credibility. Obviously the policy option of releasing details about targeted individuals is a component of this; an Israeli-style drone court could provide a more complete mechanism that covers collateral damage casualties as well.

Inadequate U.S. government civilian casualty reporting

As discussed directly above, the U.S. has no process for publicly reporting civilian casualty estimates resulting from its drone strike operations. More generally, it has never released any comprehensive data on these numbers. Independent estimates of civilian casualties are significantly larger than the sporadic U.S. government claims of casualties [7]. Moreover, these U.S. government claims appear to lack credibility, with official statements referring to few or zero casualties (e.g., [60, 61]) having been discredited in some instances. All this detracts significantly from the perceived legitimacy of the U.S. CT campaign. This is reflected in the report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism [39], which has specifically called on the U.S. to release its civilian casualty estimates.

As with the previous issue, an Israeli-style drone court could provide a mechanism for more public and consistent reporting of civilian casualties, depending on how the court was set up.

Ethical considerations

Two topics that can be considered ethical issues are presented in this section.

Civilian casualties, apologies and redress

Drone strikes cause civilian casualties, both as collateral damage and in the case of civilians being misidentified as al Qaeda affiliates [7]. This is an ethical issue as well as one of TME. The casualties may or may not meet the threshold of proportionality; due diligence may or may not have been performed. In any of these cases, ethical questions related to the loss of life remain, as does an onus to minimize civilian harm going forward. The framework described above on the strike process and operational considerations will provide one way to predict the effect of the policy options on civilian casualties.

Aside from the existence of civilian casualties, questions have been raised about whether the U.S. government reacts adequately to civilian casualties, both in its acknowledgement of and apologies for them and in the ability for victims and families of victims to seek redress. The U.S. established effective practices of apologizing for accidental civilian deaths and providing reparations in Afghanistan [7] (although these are not required under IHL). An Israeli-style drone court could provide a streamlined means for doing this in the future.

Stress on populations in operating areas

In addition to the toll taken on victims of drone strikes and their families and friends, drone strikes can be traumatic for local populations. Living underneath armed drone operations, the local public can come to feel a constant fear of attack, augmented by a buzzing sound day and night in places where the drones are audible (see [62, 63]). On top of being a serious ethical issue, this stress in the local population risks increasing radicalism and anti-Americanism.

Revealing more details about U.S. targeting policy and those suspects who have been targeted (the latter potentially through an Israeli-style

drone court) could give the strikes less of a feeling of randomness to the local population. It could also give the population greater control over their own fates through giving them knowledge of ways to avoid being mistakenly targeted or becoming collateral damage (although obviously, any terrorists would be privy to this information too). This could provide some comfort to the population. Decreasing the number of drone strikes would perhaps be the biggest mitigation for this problem, however, which may or may not result from the military preference policy, a FISA-like drone court or indirectly (via a chilling effect) from an Israeli-style drone court.

Miscellaneous issues

Room to improve with respect to setting drone strike precedence

One think tank reported that over 70 countries own drones [64], though only a small minority operate armed ones (see, for example, [44, 65]). China reportedly considered using a drone strike to kill a drug lord in Burma (but captured and tried him instead, perhaps to avoid some of the controversies discussed herein) [66], and is putting significant investment into drone technologies, including its first stealth drone [67]. Moreover the commercial use of drones is on the horizon (e.g., [68, 69, 70, 71]).

The U.S. is currently setting precedents for the use of drones, in particular for the purpose of targeted killing. Of the numerous other countries investing in drones, some do not share the U.S.'s values and interest in complying with international law, and the U.S. might not be satisfied with those countries carrying out drone strikes with the same level of transparency and other such practices that it currently does [72]. Thus it is all the more important to be developing responsible standards for use at this early stage, when U.S. influence is likely maximized. As CIA Director Brennan noted, “if we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well” [32]. If the U.S. were to firmly establish high standards for the use of armed drones, then even if a rogue country did not adhere to the standards, the international security situation would likely be improved, with other nations more likely to rally against the rogue nation.

All of the policy options considered here have the potential to increase the standards for legality, transparency, accountability and/or ethics in executing drone strikes and therefore to set a more stringent precedent. In particular, an Israeli-style court that evaluates strikes and the grievances of victims and their families, and being more transparent with targeting policies and past strikes are two options that could set especially positive and consequential procedural and legal precedents for drone usage.²⁴

Drone strikes are inherently a military activity

Implicit in many of the writings about U.S. drone strike operations is that these operations are inherently a military activity, and so it is proper that they be undertaken by the military. Indeed, they are disciplined lethal operations carried out using military weapons within what the Bush Administration termed the “War on Terror.” The military preference policy would better align drone strike operations with this perspective.

Secrecy

The extent to which the U.S. can engage in operations such as drone strikes clandestinely or covertly is to some extent an issue of military effectiveness, and has implications for the perception of U.S. legitimacy. If drone strikes can largely be kept a secret from the public internationally or in the country in which they take place, this can support the perception that the U.S. is respecting state sovereignty and not acting to further its CT mission, which might increase the perception of U.S. legitimacy. Moreover, these actions may effectively help the U.S. achieve its CT objectives without a large ground operation, which could widely be seen as more illegitimate than any drone strikes. Thus, effectively maintaining secrecy of its operations can be a tool with which the U.S. increases or maintains the perception of its legitimacy.

24. One report recommends going much farther in this vein than the listed policy options, urging the U.S. to “foster the development of appropriate international norms for the use of lethal force outside traditional battlefields” [53].

As is noted in Appendix A, even if total secrecy is not attained but the strikes are not widely known, the host country may choose not to acknowledge them for diplomatic and practical reasons, and in essence the “secret is safe” from the perspective of the broader international community.

There is a risk to this practice, however, because if the actions done in secret are discovered, the backlash and perception of legitimacy could be more negative than if the operation had just been done in the open. Moreover (and as further discussed in Appendix A), with respect to drone strike operations specifically, strikes obviously leave evidence that they occurred. Given that very few nations in the world currently operate armed drones, the ability to attain true secrecy may be questionable.

The military preference policy (especially if it includes a preference for Title 10 action) could decrease the flexibility the U.S. has to carry out secret drone strike operations. This outcome thus would have both potential risks and rewards with regard to the perception of U.S. legitimacy.

Summary of legitimacy issues

To summarize, the perception of legitimacy of U.S. drone strike operations is hindered by a number of issues that can be addressed to varying degrees by changes in drone strike policy. Those issues include:

- Legality issues
 - Controversy over specific aspects of the U.S.'s legal rationale
 - Questions about IHL protections to nonmilitary and military personnel
 - Lack of transparency in OGA compliance with international law and OGA chains of command
 - The legality of signature strikes and their consistency with stated targeting policies

- The potential obligation for inquiries into and public explanation of civilian casualties
- Transparency issues
 - Significant information about targeting policy is unknown
 - Oversight by Congressional Committees is largely classified
 - Supporting and supported roles within an operation further blur legal distinctions
- Accountability issues
 - Inadequate U.S. government civilian casualty reporting
 - Information not released after strikes
- Ethics issues
 - Civilian casualties, apologies and redress
 - Stress on populations in operating areas
- Miscellaneous
 - Room to improve with respect to setting drone strike precedence
 - Drone strikes are inherently a military activity
- Secrecy practices, which have both advantages and disadvantages for the perception of legitimacy

Of the policy options considered here, an Israeli-style drone court and releasing additional detail about targeted individuals would address the greatest number of issues, while a FISA-like drone court would address the fewest. At the same time, all of the issues listed above could be significantly addressed by at least one of the policy options considered here except for the controversies over the U.S.'s legal rationale, the ethical considerations of civilian casualties, and perhaps the stress drone strike operations cause on local populations.

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Anticipating net effectiveness

The Obama Administration has noted that the current CT campaign “is an effort to dismantle a specific group of networks that pose a threat to the United States....You cannot eliminate terrorism” [1]. This speaks to an end goal of keeping the U.S. and its citizens largely safe from terrorist attack. This section outlines a general way to use the considerations raised in this paper to anticipate how changes in drone-strike policy will contribute toward or detract from this goal, i.e., their net effectiveness.²⁵

TME and the perception of legitimacy have direct impacts on net effectiveness.²⁶ For instance, greater TME might mean that more al Qaeda leaders are killed and hence those individuals never carry out any planned terrorist attacks, and a greater perception of legitimacy might mean that anti-Americanism would decline and fewer people would be motivated to perpetrate terrorist attacks against the U.S. and its interests.

TME and legitimacy are also interrelated. They can bolster one another—for example, a greater perception of legitimacy can result in increased operational support from allies such as increased intelligence sharing and allowing the use of their airspace, which could lead to more accurate and timely targeting, among other things. At

25. The notion of “net effectiveness” could be broadened considerably: arguably any U.S. actions abroad have both an immediate goal (in the case of CT operations: safety from terrorist attacks) as well as goals of maintaining or furthering Western and American values and interests. A more extensive analysis along the lines of what is presented in this section could incorporate these much broader goals.

26. A similar point to this—and the further discussion in the paragraphs below—could be made for OME and SME just as well as for TME. However, here as in the rest of this paper, the focus is restricted primarily to TME.

the same time, improvements to targeting and operating procedures could mean that fewer civilian casualties accrue, which bolsters U.S. legitimacy.

On the other hand, TME and legitimacy can also be at odds with one another. For instance, releasing certain specific details about U.S. standards for targeting may add greatly to the transparency of the process but allow terrorists to avoid drone strikes. Alternatively, the U.S. might be able to achieve much military success by not taking steps to avoid civilian casualties and other collateral damage, but it would come at the cost of the U.S.'s ethical standing and adherence to international law.

Consider that a successful foreign-based²⁷ terrorist attack entails:

- The individual or group of terrorists being personally motivated to carry out the attack
- A failure to stop the attack by the U.S. and the international community
- A failure to stop the attack by the nation from which it was based

The discussion that follows explores each of these three aspects, and considers how increased perceived legitimacy and TME of U.S. drone strike operations could affect each. While numerous secondary effects could stem from such increases, the discussion below attempts to focus on those that are relatively immediate. Policymakers and other interested parties are encouraged to consider deeper analysis along these lines in the context of the types of specific scenarios most relevant to their situations.

27. Due to the focus in this paper on U.S. drone strikes abroad, the scope of this discussion is limited to terrorists who plan or launch attacks from abroad, vice “homegrown” terror. More specifically, in accordance with stated U.S. policy discussed above, the focus is on only foreign-based attacks from nations that consent to U.S. operations, or are unable or unwilling to act against the given threat to the U.S.

The individual or group of terrorists being personally motivated to carry out the attack. Disenfranchisement and other factors are linked to radicalization in general [73], while negative perceptions of the U.S. and the West lead to anti-Americanism specifically. Negative perceptions of the U.S. and the West can be increased by the perception that the U.S. CT campaign is illegitimate; alternatively, they can be decreased by the perceived legitimacy of U.S. actions. Anti-Americanism can also result from poor military and security effects such as civilian casualties, or terrorist leaders recruiting and encouraging terrorist action without disruption by military forces. Thus the perceived legitimacy and TME of U.S. drone strikes (or the lack thereof) could affect the personal motivations of would-be terrorists—both in the local area that strikes take place and more widely around the world.

A failure to stop the attack by the U.S. and the international community. Increased TME and/or sufficient intelligence might contribute to the U.S. and the international community being more able to stop a terrorist attack. Obviously, the greater the TME, the more likely it is that drone strikes would be able to successfully prosecute their targets and thus disrupt terror plots, and the less likely that individuals who further U.S. security (such as local leaders) would be mistakenly killed. Increased TME in areas such as these and perceived legitimacy could garner greater support from the local population, making it more inclined to support intelligence collection and actions by U.S. forces (e.g., by allowing greater freedom of action by U.S. forces). On the other hand, TME has the potential drawback of successful targeted killings resulting in a dead end with respect to intelligence collection, since suspects are killed rather than captured and therefore cannot be questioned. Other potential sources of intelligence such as computers may also be destroyed by strikes.

The level of support the U.S. receives from allied and (a prior) neutral nations (which may include the nation the strikes will take place in and/or third-party nations) would be bolstered by the perceived legitimacy of U.S. operations (and vice versa). Note that such support could include things like sharing intelligence, providing coalition forces for operations or allowing U.S. forces to base on their land or transit via their roads, airspace or territorial waters, all of which could increase military and net effectiveness.

A failure to stop the attack by the nation from which it was based.

Contributing factors might include things such as insufficient intelligence, an ineffective internal security force and/or a lack of political will. The extent to which U.S. actions, and drone strike operations in particular, affect these points would depend on the relationship the country in question—call it the nation containing the target (NCT)—has with the U.S. For the purposes of this paper, this relationship can be thought of as falling along a continuum that goes from working fully with the U.S. on CT operations to not cooperating with the U.S. or even actively working against U.S. interests.

If the NCT cooperates with the U.S., then greater legitimacy of U.S. operations could make the local NCT population more sympathetic to the NCT and U.S. campaign, and therefore more inclined to provide accurate intelligence, to support broader freedom of action by NCT security forces, and to give more political support to the NCT for these actions. This political support could further encourage the NCT government to carry out operations against the terrorist in question. U.S. TME would bolster the ally NCT's TME, if the U.S. is providing military support to NCT operations. However, if the NCT government is unpopular with the local population, these gains would be diminished and might even be maximized by not publicizing U.S. cooperation with the NCT government.

If the NCT does not cooperate with the U.S., then the TME and legitimacy of U.S. drone strike operations would likely have a more minimal effect on the ability of the NCT to stop the attack, although the NCT might have more political will to attempt to disrupt the terrorist plot the more legitimacy U.S. actions abroad are seen to have. If the U.S. were nonetheless using drone strike operations against the threat, however, and that practice was viewed as legitimate and resulted in minimal collateral damage, then tensions would not rise as much between the U.S. and the NCT as if the U.S. strikes were viewed as less legitimate or accrued more collateral damage. Tensions with the NCT could also decrease if U.S. operations were effective and did kill local al Qaeda leaders and their local political or military constituencies disbanded. However, there would also be the possibility that the NCT would actively counter U.S. operations; in this case, increased TME could help the U.S. to defeat these actions.

These considerations are summarized in Table 1.

Table 1. Potential advantages in disrupting terror plots in the nation containing the threat (NCT) that could result from increased TME and increased perceived legitimacy in drone strike operations.

Effect on:	Increased U.S. TME	Increased perceived U.S. legitimacy
The individual terrorist	<ul style="list-style-type: none"> • Anti-Americanism reduced through fewer civilian casualties and other collateral damage • Radicalization or plot not fully developed due to leader being effectively targeted 	<ul style="list-style-type: none"> • Anti-Americanism reduced
The U.S. and international community's actions against the threat	<ul style="list-style-type: none"> • More plots disrupted • People who further U.S. security are less likely to be killed • More popular support leading to more local intelligence and freedom of action 	<ul style="list-style-type: none"> • Increased support from allies • More popular support leading to more local intelligence and freedom of action
The NCT's actions against the threat—ally case	<ul style="list-style-type: none"> • More popular support leading to more local intelligence and freedom of action for NCT forces • More political will for NCT to act • Better enable NCT forces 	<ul style="list-style-type: none"> • More popular support leading to more local intelligence and freedom of action for NCT forces • More political will for NCT to act
The NCT's actions against the threat—non-ally case	<ul style="list-style-type: none"> • Less escalation between U.S. and NCT or increased ability to defeat active countering of drones by NCT • More political will for NCT to act 	<ul style="list-style-type: none"> • Less escalation between U.S. and NCT • More political will for NCT to act

(Instead of comparing outcomes from the U.S. doing drone strike operations in the NCT to those of the U.S. doing strikes that have a greater perception of legitimacy and are more militarily effective, one can compare these scenarios with other alternatives, such as the U.S. choosing not to act in the NCT, or at the other extreme, pursuing the threat with ground troops. This would generate a separate calculus that would bring out different implications. For example, the use of drone strikes in an NCT that is not an ally would be more escalatory and of greater risk to U.S. security than doing no action in the NCT, and would likely be less escalatory than sending in ground troops.)

In light of this discussion, the following steps are recommended in order to evaluate the potential net effect of a drone strike policy:

- Using the considerations in the previous sections, determine the extent to which the policy furthers the TME and the perceived legitimacy of drone strike operations.
 - Apply this to Table 1 (or a more detailed product along these lines that is focused on a particular scenario of interest) to yield the extent to which the items in the cells of the table could be expected.
- Use the considerations in the previous sections to determine any risks to TME and perceived legitimacy the policy would entail.
- In a similar fashion, determine OME and SME implications as desired.
- Consider any effects of changes in TME and perceived legitimacy (as well as any determined effects on OME and SME) on either bolstering or hindering one another, as discussed earlier in this section.
- Analyze all of these factors in concert to achieve a prediction of the net effect.

Note that carrying out such an analysis of the five policy options considered in this paper will require the details of the intended implementation of the options, as well as input from operators and others familiar with the specifics of current drone strike practices.

Conclusions

This report has presented a framework with which to systematically consider the effects of drone strike policy changes, with a focus on TME, legitimacy and a methodology for anticipating net effectiveness. This section summarizes the findings for each of the policy options considered and provides some concluding remarks.

The military preference

Instituting a preference that the military perform drone strikes—guidance issued by President Obama in May 2013, but with implementation interrupted as a result of Congressional actions—would add transparency and a stronger expectation of legality to drone strike practices since the military's doctrine, operating procedures and chain of command structure are relatively well understood and are known to be aligned with international law. IHL protections to military personnel also indicate that this option would be better aligned with the spirit of the law.

Ironically, the lack of transparency of the content of the presidential guidance is currently an impediment to analyzing its implications, with the guidance itself classified, as well as the legislation that Congress passed that reportedly limits its implementation. Releasing content of President Obama's guidance would seem to be in the spirit of the guidance itself, although as with all the other options discussed in this paper, a cost/benefit analysis (using the framework presented here) would be in order.

The military preference policy would have implications on oversight and accountability of drone strikes, as DOD falls under different mechanisms than OGAs. The effects of these implications are not immediately clear, but could be analyzed by those directly involved in drone strike processes. In particular, a comparison of the oversight by the Congressional Armed Services Committees with that of the

Congressional Intelligence Committees could provide highly relevant insight. The military preference would also likely impact TME—perhaps in both positive and negative ways—and operators and other involved personnel would be in the best position to assess these risks and potential rewards as well.

An evaluation of the military preference policy should focus primarily on determining its anticipated effects on TME, oversight and accountability. Those effects should be considered together with the additional transparency and alignment with international law the policy could afford.

A specific preference for drone strikes to be employed under Title 10 (i.e., by the military and not as covert actions as defined in Title 50, but with no restrictions against actions that are clandestine, or TMA and covert as defined in doctrine) could be included as a part of this option. If, in practice, the restrictions this entails effectively lessen the secrecy around drone strike operations (see Appendices A and B), then this option would provide for additional transparency at the cost of more limited options for drone strike operations. Such limitations could increase diplomatic and operational risks.

A FISA-like drone court

A FISA-like court would authorize drone strikes. The proponents of a FISA-like court note that from a legal perspective, it might be considered comparable to a court approving a warrant based on probable cause, as is the case for the FISA court [16]. Nonetheless, this option appears to raise the most legal questions (with respect to U.S. law). One report [74] puts forth that, “such a court would likely be unconstitutional because it would violate the separation of powers and would be asked to render advisory opinions rather than rule on actual cases and controversies. The result would be to give a patina of legitimacy to a ruling for summary execution following a one-sided argument.” To those who wonder why a FISA-like drone court would be problematic when a warrant-issuing FISA court is legal, a retired federal judge noted that “the answer is simple: a search warrant is not a death warrant” [75]. Moreover, in an armed conflict, a FISA-like drone court would be an intrusion into battlefield decision-making

and contrary to the chain of command, and outside of an armed conflict, it could be at odds with requirements such as a target being an imminent threat [74]. (This again raises the issue of the U.S.'s relatively expansive meaning of an “imminent threat.”)

Legal questions aside, a FISA-like court could bolster the legitimacy of drone strike practices by adding additional oversight to the process, thereby arguably setting a better precedent for the military use of drones. This additional oversight could potentially result in lower collateral damage and other unintended consequences, and could potentially encourage the government to release some information about individual drone targets after strikes are completed. Those who currently execute drone strikes should use the framework given to determine further tactical and operational effects this option might have, such as whether it would slow down the targeting process, and, if so, whether that extra time, together with the additional oversight, would lead to better or worse TME overall.

It's worth noting that the FISA court that this policy is modeled after confers only limited legitimacy to the U.S. government's collections of electronic communications. The court is controversial (see, for example [76])—it reportedly approved all but one of the over 8,000 requests it received from 2009 through 2013 [77], and is viewed as a rubber stamp by many. If a FISA-like drone court would be expected to behave similarly, these types of controversies might outweigh any increased legitimacy the process would confer.

Overall, however, the primary considerations for a FISA-like drone court appear to be its legality with respect to U.S. law and the overall effect it would have on TME.

An Israeli-style drone court

An Israeli-style court would review drone strikes after they occur. It could be implemented in a number of different ways, with various options for who oversees the court, to what extent (if any) its findings would be released to the public, and the criteria that would determine what strikes it investigates. It could potentially increase the accountability and transparency of drone strike operations, and

could provide a means to communicate targets' terrorist activities to the public or to provide redress to innocent drone strike victims and their families. As discussed above, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism sees these latter activities as legal requirements [39].

This option could be used as a mechanism for public reporting of civilian casualty numbers. Risks include the potential for a chilling effect on strike operations in anticipation of this layer of oversight, and potential public backlash if strikes are found to be done improperly.

As for the FISA-like court, it would be worth evaluating the level of legitimacy the Israeli courts confer on drone strikes in Israel in order to get a sense for the potential pitfalls of this option.

Thus depending on how an Israeli-style court procedure would be implemented, it could play a variety of different roles and bolster U.S. legitimacy to various degrees depending on these roles. The main issues here would be to decide on the optimal implementation of the court based on what areas of legitimacy are most desired to be addressed and on how well drone strike practices would stand up to various levels of scrutiny, as well as any indirect operational impacts.

Releasing further details about targeting

The two independent policy options in this category are (1) releasing more information about the U.S.'s targeting processes and standards, and (2) releasing details about targeted individuals after a strike has occurred (as could be done through an Israeli-style drone court or otherwise). Either of these options could significantly increase transparency for drone strike operations, thereby bolstering U.S. credibility, assuming processes are sound and strikes are not found to have been done improperly.

All the policy options considered in this paper have the potential to hinder U.S. military effectiveness through increased transparency, giving adversaries more information about operations that they could

use to avoid being targeted. However, for these two policy options, this risk is especially high.

Providing detail about targeted individuals would be an unusual measure to take during an armed conflict. Releasing information that harkens to “evidence” might give the impression that drone operations have legal obligations like those of law enforcement, when the U.S. government's position in the current context is that they do not. This could raise additional controversy and further confuse perceptions of the legal framework the U.S. is using.²⁸

Some of the current issues surrounding accountability could be addressed by releasing details about targeted individuals. As a caution, however, note that releasing partial information and/or releasing information related only to certain strikes might backfire by drawing further attention to the information that is not released, thereby making the public and the international community even more suspicious of U.S. drone strike secrecy and practices.

In short, either of these two policy options has the potential to greatly increase the transparency of drone strike operations, but could also potentially entail significant risk to U.S. operations depending on the type of information released. Thus, the specifics of any proposal along the lines of these options should be carefully evaluated and the corresponding trade-offs considered.

Overview of initial findings of all policy options

An overview of these findings on the policy options is presented in Table 2.

28. Perceptions of the U.S.'s legal framework may be confused by the fact that some of the current policies and doctrinal standards surrounding drone strikes already harken to the notion of “evidence,” such as President Obama's stated requirement for “near certainty” that civilian casualties be avoided [6].

Table 2. Potential effects of policy options on military effectiveness and identified legitimacy issues. Potential improvements and potential worsenings of conditions are noted, along with areas where an effect is likely but best assessed by DOD, OGA and other relevant personnel. Blank cells indicate that no effects are noted.

		Military preference	FISA-like court	Israeli-style court	Release info about targeting process/ standards	Release info about targeted individuals
Impacts on military effectiveness	Tactical strike steps	Effect likely; best assessed by relevant personnel	Effect likely; best assessed by relevant personnel	Effect likely; best assessed by relevant personnel		
	Adversaries' actions	Potential of worsening conditions	Potential of worsening conditions	Potential of worsening conditions	Potential of worsening conditions	Potential of worsening conditions
Addressing legitimacy issues	Legality	Potential improvements		Potential improvements	Potential improvements	Potential improvements
	Transparency	Potential improvements		Potential improvements	Potential improvements	Potential improvements
	Accountability			Potential improvements		Potential improvements
	Ethical considerations			Potential improvements	Limited potential improvements	Limited potential improvements
	Miscellaneous	Potential improvements	Potential improvements	Potential improvements	Potential improvements	Potential improvements
	Issues around secrecy	Effect likely; best assessed by relevant personnel				

Table 2 shows that the policy options considered have the potential to significantly improve the perception of the legitimacy of drone strike operations (particularly an Israeli-style drone court and releasing information about targeted individuals), but also all potentially pose risks to military effectiveness. However, it is not an “apples to apples” comparison: two cells with the same label do not necessarily indicate identical—or even comparable—effects. Rather, the specific considerations within the body of this report should be taken into account. Furthermore, any effects would also depend on the specifics of the implementation of each policy option. Moreover, the policy options are not mutually exclusive—there are no restrictions against implementing more than one option, and in fact this may be desirable.

Final thoughts

The policy options presented in this paper indicate that there are likely no silver bullets that would bolster (or not hinder) the military effectiveness of drone strikes while staying within the confines of international and domestic law, increasing transparency, and so on. Each of these options significantly addresses some of the current issues and controversies with drone strikes, and yet there are issues that are not addressed by any of them—including unresolved issues related to international law—or are only minimally addressed—notably, the ethical considerations of civilian casualties and the effects of drone campaigns on local populations.

In the context of this unfortunate lack of easy solutions, the framework and discussion presented here offer a means with which to think through at least some of the consequential issues related to drone strikes, and provide a tool for determining the implications of proposed changes to drone strike operations.

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Appendix A: Title 10, Title 50 and oversight

As is the case with international law, U.S. domestic law regulates when and how the U.S. may use force.²⁹ Both Congress and the Executive Branch play important roles in these processes, and this appendix concentrates on aspects of those roles that are embodied in Titles 10 and 50 of the U.S. Code, with a focus on oversight. This appendix aims to clarify the interplay of the two Titles in drone strike (and other CT) operations and to provide background on the military preference policy. In doing this, it begins a discussion of covert actions which is continued in the next appendix.

Titles 10 and 50 of the U.S. Code are often misconstrued in the debate over drone strikes, where “Title 10” is used as shorthand for the military and its actions, and “Title 50” for the intelligence agencies and their actions (e.g., [78, 79]). In fact the distinction is not so clear-cut—the military can act under Title 50, as is detailed below—but oversight mechanisms constitute an important difference.

Title 10 provides for the structure and general powers of the armed forces, as well as the oversight mechanisms for most military activities. In particular, actions such as TMA fall under Title 10, and as such are overseen by the Congressional Armed Services Committees. TMA is not defined in the law, although Congress has provided some non-statutory guidance that is discussed in Appendix B.

29. There are several circumstances in which the use of force is permitted. For one, the President has an implicit duty under Article II of the U.S. Constitution as Commander-in-Chief to defend the nation. In addition, Congress may declare war or otherwise authorize the use of force through legislation. Finally, the War Powers Resolution allows the President to authorize the use of force based on immediate need and without Congressional approval for 60 days, after which time, if Congress has not acted, s/he has another 30 days to withdraw U.S. forces.

Title 50 is entitled “War and National Defense.” Among other things, it governs intelligence collection, covert actions (as defined in the title) and the oversight of these activities. It also governs the structure and some of the functioning of the CIA, and aspects of the intelligence community more broadly.

Title 50 defines a covert action as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly,” while exempting TMA, traditional diplomatic activity, intelligence collection and several other types of activities.³⁰ (This differs from DOD's doctrinal definition of a covert action, which is discussed further in Appendix B.) Title 50 specifies that the president may authorize covert actions by means of written findings. Although the CIA is considered the traditional agency for carrying out covert actions, Title 50 makes reference to the possibility of other departments or agencies carrying out the actions,³¹ so, in particular, DOD may carry out covert actions (as defined in Title 50) such as covert drone strikes, and thus act under Title 50. Whether DOD carries out Title 50-covert actions in practice is a separate issue that is not addressed in this report, although this would have implications for the military preference policy.

Title 50 stipulates Congressional oversight for covert actions, requiring “the Director of National Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action...[to] keep the congressional intelligence committees fully and currently informed of all covert action,”³² although in exceptional circumstances, activities can be temporarily revealed only to the so-called “Gang of Eight” (i.e., the Majority and Minority Leaders of the Senate, the Speaker and Minority Leader of the House, and the Chairmen and Ranking Minority Members of the House and Senate Intelligence Committees). Senate Intelligence

30. Section 3093 (e).

31. See also Executive Order 12333 (Part 1, 1.8(e)) [80].

32. U.S. Code, Title 50, Section 3093 (b).

Committee Chairwoman Feinstein has put forth that her Committee “receive[s] notification with key details shortly after every [drone] strike, and...[holds] monthly in-depth oversight meetings” that look rigorously at the drone program [81]. Issues surrounding covert actions are discussed at greater length in Appendix B.

One significant issue of interest here is that the oversight and accountability mechanisms in Title 50 are triggered by reasonably subjective criteria for DOD. Indeed, as noted above, TMA is not defined in U.S. law, yet any activity classified as TMA is exempt from the requirements for covert activities of a presidential finding and oversight by the Intelligence Committees. Similarly, there can be overlap between intelligence collection (which falls under Title 50 and is overseen by the Intelligence Committees) and TMA such as Operational Preparation of the Environment (OPE), which can include, for example, significant intelligence collection from a site in advance of an attack but falls under Title 10. DOD's interpretations of TMA and OPE have been described as “broad” [82].

As it stands, this ambiguity leaves DOD open to the perception that it is (or has the potential of) circumventing Title 50 oversight mechanisms by classifying its activities as TMA. (See for instance [56].) Indeed, broad interpretations of these missions would circumvent the significant requirement of a presidential finding, but in addition this perception may presuppose that Title 10 oversight by the Armed Services Committees is somehow preferable to DOD in certain cases over Title 50 oversight by the Intelligence Committees. In fact, pundits have made various further claims that the oversight of the Intelligence Committees or the Armed Services Committees is qualitatively superior to that of the other. The basis for either assertion has not been satisfactorily clarified in any writings seen by this author. Indeed, the Congressional oversight process with respect to issues such as drone strikes is poorly understood by the American public, for although public hearings can get substantial media coverage, the reporting requirements and other means of oversight employed by Congress and its Committees are not well explained by Congress. Comparing the oversight of these Committees would be a worthwhile venture, but would best be a part of a more thorough public explanation of the oversight process. In particular, such a comparison would have important ramifications for the military preference policy.

In any case, if the government were to describe how it defines TMA and OPE and distinguishes them from Title 50 activities, that would increase the transparency (and perhaps the consistency) of the oversight process, although it is possible that this would cost DOD some flexibility that comes out of the existing ambiguity.

One relevant practice that ties into all of these issues is that of one government agency acting in a supporting role for an operation led by another agency. Thus, in addition to DOD acting under Title 10 or Title 50 and OGAs acting under Title 50, DOD may provide forces in support of an operation that is under the direction and authority of an OGA, and similarly an OGA may act in support of a DOD operation. These practices may be practical and aid tactical and operational effectiveness, but as with the lack of a definition for TMA, they hinder transparency and could leave the perception that the agencies involved are skirting some oversight mechanisms. This topic is discussed further in the section on legitimacy issues.

Appendix B: Covert actions

This appendix provides a more in-depth discussion of covert actions within U.S. domestic law. It aims to articulate and clarify some of the issues related to covert actions, and presents further considerations with regard to the military preference policy, particularly in the case that the policy includes a preference for strikes to be carried out under Title 10. If unqualified, “covert” will be taken to mean an action by a government that, at the time the action is carried out, is not intended to be acknowledged by the government.

Covert actions have a long history of being carried out by nations for military, security and diplomatic ends. Espionage serves as a primary example, and is considered legal under international law as a form of self-defense and under customary law. Espionage as a general practice is not particularly controversial, perhaps because there is a tacit understanding that “everyone does it” and it is not understood to be particularly violent. Covert military (or paramilitary) actions do not share these comforts, although they are legally justified as being derived from customary international law.

It has been widely reported that the U.S. has carried out covert drone strikes in Pakistan, with the conventional wisdom that they were performed with such secrecy so as to allow the Pakistani government the ability to plausibly deny that the strikes are taking place (although the Pakistani government has in recent years acknowledged them via condemnations, e.g., [83]). Furthermore, various media outlets have asserted that the CIA must perform these operations, with the implication that DOD does not carry out covert drone strikes (see for example [84]), although Appendix A discusses how DOD is not legally barred from conducting such activities.

Noncommittal and conflicting statements have come out of high levels of the U.S. government on the subject of the U.S. military carrying out covert actions. In his 2007 confirmation hearing to be the

Undersecretary of Defense for Intelligence, General Clapper (who was confirmed for that post and is currently the DNI) testified that Title 50 covert activities “are normally not conducted...by uniformed military forces” (emphasis added), tacitly acknowledging that DOD forces conduct covert actions [56]. However, in his written testimony for the same hearing, General Clapper said it was his understanding that “military forces are not conducting 'covert action,'” but are limiting themselves to clandestine action [56]. He went on to explain that he had been referring to a passive/active distinction that is given below.

The notion that only the CIA may perform covert actions or that DOD is barred from performing them is indeed pervasive, not only within the media but also within the defense community and the government. (See for example Senator Nelson's more recent questioning of General Clapper [85].) As noted above, DOD not only appears to be permitted to carry out covert action under U.S. law, but its own doctrine makes reference to conducting such actions. This provides evidence that U.S. policy with respect to covert actions is unclear, both for the general public and within the defense community.

Contributing to the confusion is the lack of consensus on the meaning of the word “covert”: “covert action” is defined in Title 50, a “covert operation” is defined in military doctrine (the definitions are similar but not identical), and the term “covert” is used in even different ways colloquially and in General Clapper's Senate testimony, where he ascribes to the word an active/passive meaning. These usages are given in Table 3, as is the doctrinal definition of “clandestine.”

Table 3 shows that the “passive/active” alternate DOD characterization by General Clapper is notably different from the other usages (and perhaps would be more straightforward for operators and lawyers to work with).

Table 3. Definitions of “covert”

Usage	Definition	References
U.S. law (Title 50)	<p>...[T]he term “covert action” means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include</p> <ol style="list-style-type: none"> 1. activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities 2. traditional diplomatic or military activities or routine support to such activities; 3. traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or <p>activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad. (Emphasis added.)</p>	U.S. Code, Title 50, Section 3093
DOD doctrine	<p>Definition of covert operation: An operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor.</p> <p>Note also: Definition of a clandestine operation: An operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.</p>	DOD Joint Publications [15, 16]
Alternate DOD characterization	Although testifying that the term “clandestine activities” is not defined by statute, [General Clapper] characterized such activity as consisting of those actions that are conducted in secret, but which constitute “ passive ” intelligence information gathering. By contrast, covert action, he suggested, is “ active ,” in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target. (Emphasis added.)	Clapper testimony [56]
Colloquial usage	Any secret action	Standard dictionaries, e.g., [86]

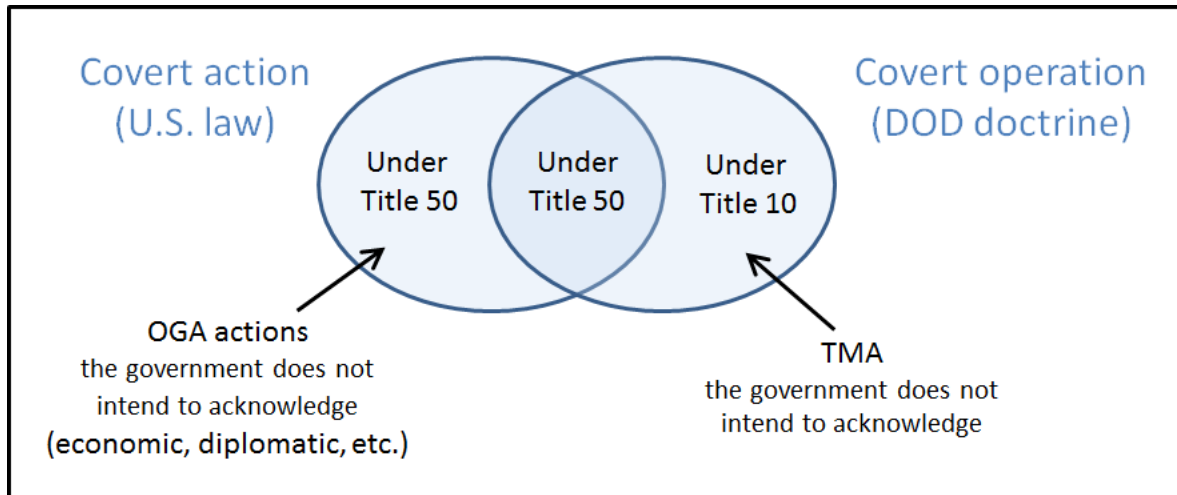
The colloquial usage of the word “covert” lacks the subtleties of how the term is used in law and doctrine. In particular, note that the DOD and Title 50 definitions allow for the disclosure of a covert action after the fact, as long as there is the intent for nonattribution at the time the action is done.³³ This allowed, for example, then-CIA Director Leon Panetta to describe the raid that killed Osama bin Laden as a “covert operation” [14], when he and President Obama presented it to the American public after the attack [14, 88]. Conversely, an activity would not be covert if it is intended to be acknowledged—even though there are no statutory limits on when such acknowledgment must take place. This means that, at least in theory, an operation could go unacknowledged by the U.S. government for years after it took place, and it could still be considered non-covert and need not fall under Title 50. Thus if one hypothetically wanted to “game the system,” one would find a weak line dividing the covert from the non-covert.

In the remainder of this appendix, “Title 50-covert” refers to being covert under Title 50, and “doctrinal-covert” refers to being covert under DOD doctrine. (Recall that “covert,” if unqualified, refers here to a government action that is intended to be unacknowledged.)

The Title 50-covert and doctrinal-covert definitions are subtly distinct. Indeed, doctrinal-covert actions are DOD actions, whereas the Title 50-covert actions can be broader, potentially including political, economic, diplomatic and other activities as well. In addition, the definition of doctrinal-covert has none of the exemptions contained in the definition of Title 50-covert, such as the exemption for TMA. This means that an operation could theoretically be considered a TMA under U.S. law—and therefore not Title 50-covert—but simultaneously be doctrinal-covert. See Figure 1. Thus the military can carry out covert—i.e., unacknowledged—actions under Title 50 and under Title 10, based on whether the legal or doctrinal definition of “covert” is used.

33. Journalists and scholars sometimes indicate that a covert action *may not* be acknowledged by the government after the fact. See, for example, [56, 87]. This does not appear to be supported by either Title 50 or doctrine. (Moreover, material is often classified for a specified window of time, such as several decades.)

Figure 1. Relationship between legal and doctrinal definitions of “covert.”



As noted above, the definition of a Title 50-covert action exempts TMA, but does not define TMA. A former acting CIA General Council has noted that coming up with a statutory definition of TMA has been “exceedingly difficult” [89]. Nonetheless, in the early 1990s, the House of Representatives expressed the following intent for the term's meaning:

It is the intent...that “traditional military activities” include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. [This is intended]...to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as “traditional military activities.” [90]

Covert actions can be controversial. While there is nothing intrinsically illegal about them (from both the domestic and international legal perspectives), the body of international law governing them is quite thin. Moreover, such a level of secrecy might indicate the potential of violating legal principles such as state sovereignty and IHRL, and the public is often uncomfortable with nations executing such secret actions.

Nonetheless, covert action can be a highly useful tool for nations in that, if it is successful, it might allow a nation to achieve a mission without any negative diplomatic or political consequences. Moreover, the denial of a covert action can be a useful diplomatic tool even if the action is known to the other country. One legal scholar pointed out,

It is less provocative and less disruptive to diplomatic relations not to acknowledge an operation even if the country adversely affected by it is well aware of one's involvement. The target country, either in the interests of good relations or because it cannot effectively prevent it, may ignore the covert action; it is much harder for it to do so if the government conducting it publicly acknowledges what it is doing. [30]

If revealed, however, a covert action has the potential to inflame tensions between the nation executing the action and the nation against which the action took place (or potentially the international community as a whole); this was seen between the U.S. and Pakistan in the aftermath of the Osama bin Laden raid.

A component of the military preference might be a preference that drone strike operations be carried out under Title 10, i.e., that the strikes not be carried out covertly (as defined by Title 50). The alternatives for the military to carrying out a Title 50-covert drone strike are to:

- not act,
- carry out the strike and acknowledge it,
- achieve the same ends through some other course of action,

- carry out the strike in a clandestine manner, or
- carry out the strike as a doctrinal-covert TMA.

The first option—not acting—carries with it the risk of not achieving the mission, i.e., leaving an individual deemed a threat to U.S. security untouched. The second option of carrying out a strike and acknowledging it risks heightening international tensions and perhaps invoking military conflict, even taking for granted that the U.S. is implementing a sound framework to justify the strikes it carries out. Note that the risk of tensions or conflict would be more severe if even a single acknowledged strike were thought to be improper or in violation of international law.

The third option—achieving the same ends through another course of action—might have a high monetary cost or risk to U.S. forces, if such an option would even be possible. For example, alternatives to a covert drone strike could include inserting a SOF team into a hostile area to capture or kill the targeted individual, or launching a full-scale assault into the area to capture or kill multiple targeted individuals. However, such an operation might not be any more palatable than a drone strike. Note also that if any targets are captured, the U.S. must then hold and try them either domestically or abroad—a task that can be difficult, as seen during the recent conflicts in Iraq and Afghanistan.

The fourth option raises an important question: To what extent does a covert drone strike differ from a clandestine one? Furthermore, to what extent can a drone strike be covert or clandestine at all? Starting with the second question, clearly evidence from a drone strike—which has reportedly even included weapon debris with U.S. military markings [91]—cannot be hidden from the locals in the area of the attack. Thus the U.S. may not be able to carry out truly clandestine drone strikes. Furthermore, while the U.S. can always refuse to acknowledge a strike (if even just for some amount of diplomatic cover, as described in the quotation above), given that few other countries are known to operate armed drones, the U.S. may not be able to carry out drone strikes with much true plausible deniability.

However, a strike can potentially be unknown to the international community or the broader public in the country the strike took place in (i.e., clandestine on a “large scale”) if it is done in a very remote location, or if it is not publicized by the government of that country, the media, or social media. Given the current state of global drone operations noted above, a strike could probably only potentially be unacknowledged to a broader community if it was unknown to that community. Note that this clandestine prerequisite for covert action will only hold as long as other countries largely refrain from utilizing armed drones.

Returning to the first question, it is not clear that there are any practical differences between military drone strikes that are clandestine and military strikes that are covert (as well as clandestine), aside from internal U.S. government processes such as the differing oversight and approval requirements for Title 50-covert actions; military and OGA operators and policymakers would be better positioned to speak to this topic. Again, however, this situation will remain only until other countries begin or increase armed drone operations.

This highlights that the full implications of the military preference, if it were to include a Title 10 preference, may not be realized for a number of years, if and when the use of armed drones becomes more prevalent throughout the world. At that point, non-clandestine covert drone strikes would be more viable, so the military preference policy with a Title 10 preference would be significantly more restrictive than the policy would be without a Title 10 preference.

The final option is to accomplish the mission that would have involved a Title 50-covert drone strike with a doctrinal-covert strike that is classified as TMA, if possible. Military operators and lawyers could speak to what extent this would represent a tactical or operational restriction, based on their guidelines for what constitutes TMA and what types of situations in which drone strikes are carried out could not be classified as such.

In the current state of affairs (as opposed to when non-clandestine covert strikes may be possible), if indeed a restriction to TMA or clandestine operations instead of Title 50-covert ones makes little operational difference, then there is less distinction between the military

preference policy with and without a Title 10 preference. Otherwise, if the military preference were implemented with a Title 10 preference, the U.S. would have to navigate the alternatives to Title 50-covert drone strikes, and potentially incur the risk of a significant number of the negative consequences outlined.

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Acronyms

AUMF	Authorization for the Use of Military Force
BDA	Battle Damage Assessment
CIA	Central Intelligence Agency
CT	Counterterrorism
DNI	Director of National Intelligence
DOD	Department of Defense
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FOIA	Freedom of Information Act
IAC	International Armed Conflict
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NCT	Nation Containing the Target
NIAC	Non-International Armed Conflict
NSA	National Security Agency
OEF	Operation Enduring Freedom
OGA	Other (i.e., non-military) Government Agency
OPE	Operational Preparation of the Environment
OME	Operational Military Effectiveness
POW	Prisoner of War
SME	Strategic Military Effectiveness
SOF	Special Operations Forces
TLAM	Tomahawk Land Attack Missile
TMA	Traditional Military Activity
TME	Tactical Military Effectiveness
UAV	Unmanned Aerial Vehicle
UN	United Nations

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